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MULTIEMPLOYER PENSION PLAN STABILIZATION ACT OF 1981

ORIGINAL
COMPLETED

HEARINGS
BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE
COMMITTEE ON
LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
NINETY-SEVENTH CONGRESS
SECOND SESSION
ON
S. 1748

TO EXEMPT CERTAIN FIXED CONTRIBUTION MULTIEMPLOYER PENSION PLANS FROM TITLE IV OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

MARCH 11 AND 17, 1982

Printed for the use of the Committee on Labor and Human Resources

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MULTIEMPLOYER PENSION PLANS STABILIZATION ACT OF 1981

THURSDAY, MARCH 11, 1982

U.S. Senate,
Subcommittee on Labor,
Committee on Labor and Human Resources,
Washington, D.C.

The subcommittee convened, pursuant to notice, at 9:32 a.m., in room 4232, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles, Hatch, Quayle, and Cohen.

Opening Statement of Senator Nickels

Senator Nickles. Good morning.

Today is the first of 2 days of hearings on an issue of grave concern to businesses across the country—the implementation of the multiemployer pension plan amendments.

Today we have 16 witnesses, representing a variety of business concerns, who are scheduled to testify. During the second hearing next week, on the 17th, we will hear from the Western Conference of Teamsters, the Central States Teamsters Pension Trust Fund, and Robert Georgine of the AFL-CIO's Building Trades Department.

The majority of today's witnesses are injured party plaintiffs currently in litigation. In other words, they are in serious trouble because of the 1980 statute that I believe is constitutionally questionable, inequitable, and not in the best interests of multiemployer defined benefit plans.

In the past 1½ years since the amendments were made to the multiemployer pension laws, at least 60 lawsuits have been filed and dozens of others are being prepared. I am appalled at the legislation Congress approved. Without a doubt, it showed a lack of vision for the problems it would create.

Thousands of multiemployer employers believed, and rightfully so, that their pension liability was limited only to contractual obligations. Yet, because of Congress shortsightedness, these employers are also strapped with the unfunded vested liabilities of the multiemployer pension fund to which they contribute.

Both the seriousness of the problems and fallacies of the law are outlined in numerous cases that have been brought to my attention and will be discussed in the course of these hearings. Among the most preposterous examples of the potential imposition of withdrawal liability occurs in industries like the stevedoring industry, where an employer that loses a service contract to another employer who utilizes the same employees, is deemed to have withdrawn from the plan and is liable for the unfunded portion of the vested liability of that plan.

Employers now find that if they liquidate, sell assets, go bankrupt, or a number of other situations, they are responsible for their pro rate share of the unfunded vested liability in their pension fund.

To say the least, the 1980 amendments have had a devastating effect on normal and routine business transactions, as this hearing will show. Another effect the law has had is on a new employer's willingness to sign multiemployer collective-bargaining agreements. We have gathered evidence that some newly organized employers have not been required to contribute to a pension plan. It seems that we might be seeing the beginning of the end of the multiemployer plan.

These are some of the problems, and now we must find solutions and answers.

Senator Hatch and others have offered one proposal, Senate bill 1748, which will be discussed today.

Clearly, we have a responsibility to work together and work fast before the problems intensify. I do not believe the final responsibility rests with the courts. Without a solution, it is the participants and the individual employers caught in this nightmare who suffer. Although Congress did not intend harm when it developed and approved the 1980 legislation, the damage is done and it is intensifying. It is time for Congress to be held accountable for its mistakes and to correct the problem. This time, with a vision for the future.

We are delighted to have Senator Cohen from Maine with us today. Senator Cohen was one of the first Senators to approach me, relating many of the problems that his constituents were having.

Senator Cohen, I appreciate your past interest and also for appearing before the committee today.

Senator **Cohen**. Thank you very much, Mr. Chairman.

I am not a member of this subcommittee, and I realize the pressures of time upon the business of the subcommittee, with 16 witnesses to appear hopefully before 12:30, when we have to adjourn, so I will make a few very brief observations.

I think the original bill, ERISA, the multiemployer pension plans, had a noble objective, and that was that we had many businesses that were closing and leaving their workers who had contributed over the years literally without any relief whatsoever, and that was the original purpose at the time, to provide some measure of protection against that sort of tragedy.

By the same token, we found that in adopting this action, as you have indicated, Mr. Chairman, that ERISA has created serious inequities and problems which threaten the continued survival of many businesses in returning those jobs and pensions back to the employees.

This is a situation which was originally brought to my attention by Mr. Gavin Coal, of Bangor, Maine, a small businessman who runs Coal's Express, which is a family owned trucking company, which has served the State of Maine for over 60 years. The future of Coal's Express and other companies are in jeopardy due to the withdrawal liability and termination of business of ERISA.

I would like for the record to include Mr. Coal's statement, which outlines the particular dilemma that he faces, and perhaps with your permission, Mr. Chairman, just quote one final paragraph of his letter.

It says, "In the case of Coal's Express, not only are its assets in jeopardy, but also the assets of the parent company, seriously affecting jobs of employees who have no multiemployer retirement. I cannot believe that Congress ever intended to put a majority of any corporation's employees out of work to satisfy nonnegotiated retirement benefits of the minority of any company or group of companies. Further, I cannot believe it was congressional intent to take a company that had nearly 50 years of consecutive profits, never had a dividend, always reinvested it into the business, and confiscate all of its assets in order to fund retirement for only 42 percent of its employees."

I cannot believe that is the intent of Congress, and I hope that through these hearings, we can provide a measure of equity.

Thank you.

[The prepared statements of Senator Cohen and Mr. Cole (referred to) follow:]

STATEMENT OF
SENATOR WILLIAM S. COHEN

BEFORE THE
LABOR SUBCOMMITTEE
OF THE
LABOR AND HUMAN RESOURCES COMMITTEE

HEARING ON

S.1748, MULTIEMPLOYER PENSION PLAN STABILIZATION

MR. CHAIRMAN, I AM PLEASED TO BE HERE TODAY AND WANT TO THANK THE CHAIRMAN FOR ALLOWING ME TO ATTEND THIS HEARING. AS I AM NOT A MEMBER OF THE COMMITTEE, I APPRECIATE HAVING THE OPPORTUNITY TO PARTICIPATE AND WANT TO COMMEND SENATOR NICKLES FOR HIS EFFORTS BOTH THIS YEAR AND LAST TO ADDRESS PROBLEMS IN WHAT IS A VERY COMPLEX AND DIFFICULT AREA OF THE LAW.

ERISA AND THE MULTIEMPLOYER PENSION PLAN AMENDMENTS WERE ENACTED TO STRENGTHEN THE PRIVATE RETIREMENT SYSTEM

AND TO PROTECT THE INTERESTS AND BENEFITS OF PARTICIPANTS IN PRIVATE SECTOR EMPLOYEE BENEFIT PLANS. THE PRIVATE PENSION SYSTEM, IF IT IS TO FULFILL THE CRITICAL ROLE OF MEETING THE RETIREMENT INCOME NEEDS OF OUR NATION'S RETIRED POPULATION, MUST BE PLACED ON A SOUND AND EQUITABLE FOOTING.

IT HAS BECOME INCREASINGLY CLEAR, HOWEVER, SINCE THE PASSAGE OF THE MULTIEMPLOYER AMENDMENTS THAT IN CERTAIN AREAS ERISA HAS CREATED SERIOUS INEQUITIES AND PROBLEMS WHICH THREATEN THE CONTINUED SURVIVAL OF MANY BUSINESSES AND, IN TURN, THE JOBS AND PENSION BENEFITS OF THEIR EMPLOYEES.

THESE PROBLEMS WERE INITIALLY BROUGHT TO MY ATTENTION BY ONE OF MY CONSTITUENTS, GALEN COLE, A SMALL BUSINESSMAN WHO RUNS COLES EXPRESS, A FAMILY-OWNED TRUCKING COMPANY WHICH HAS SERVED THE STATE OF MAINE FOR OVER 60 YEARS. THE FUTURE OF COLES EXPRESS AND THE OTHER COMPANIES WITHIN COLE ENTERPRISES IS IN JEOPARDY DUE TO THE WITHDRAWAL LIABILITY AND PLAN TERMINATION PROVISIONS OF ERISA. I HAVE A STATEMENT FROM MR. COLE WHICH, IN THE INTEREST OF TIME, I WILL NOT READ BUT WOULD REQUEST THAT IT BE MADE A PART OF THE RECORD. THE SITUATION FACED BY COLES EXPRESS IS CERTAINLY NOT UNIQUE, BUT I BELIEVE IT PRESENTS AN EXCELLENT ILLUSTRATION OF THE PREDICAMENT IN WHICH MANY SMALL BUSINESSES FIND THEMSELVES -- A PREDICAMENT WHICH MUST BE ADDRESSED AND FOR WHICH REMEDIES MUST BE FOUND.

AGAIN, I AM GLAD TO BE HERE, AND I LOOK FORWARD TO HEARING THE TESTIMONY WHICH WILL BE PRESENTED.

Statement of GALEN L. COLE

Chairman of the Board of Cole's Express, Bangor, Maine

Before the Subcommittee on Labor

March , 1982

My name is Galen L. Cole. I am Chairman of the Board of Coles Express, Bangor, Maine, a motor common carrier founded by my father, Albert J. Cole in 1917. It is the oldest Maine based carrier and serves the entire State. I have served as the Chief Executive Officer of Coles Express for 26 years since 1955 and have been associated with the company for all of my working career, other than military service in the Second World War.

The provisions of ERISA relating to employers contributing to Multi-Employer Pension Plans has cast a dark shadow on not only the future of Coles Express, but also on the future business and jobs of other independently operated companies which are owned by Cole Enterprises and which have nothing whatsoever to do with the New England Teamsters Pension Plan.

The trucking industry is more competitive today than at any time since the passage of the Motor Carrier Act of 1935. Greatly increased competition is accelerating the demise of weaker companies in this industry. In New England we have lost in the past few years more than 60 Teamster competitors. Replacing these carriers are lower wage non-union companies and a few giant carriers.

In Maine, where total intrastate deregulation became effective January 1, 1982, competitive pressures are becoming extreme. After many years of strict State regulation, only 6 of the 123 Maine based trucking companies which existed in 1941 are still in business today, and each of these are family businesses.

We at Coles Express are attempting to compete in this changed environment. We are striving to continue our unbroken history of 65 years of service to the most remote areas of the State, knowing that our capital is more highly at risk now than at anytime since the Great Depression.

Since 1950, Coles has had little choice but to participate in the National Master Freight Agreement, which has required the company to contribute to the Multi-Employer Teamster's Plan. There are currently 184 Teamster employees comprising only 62% of the work force of Coles Express and only 42% of the work force of the companies in the Cole Enterprises group. At the same time, our companies have contributed to company sponsored retirement plans for all other employees. I should add that we recognize our obligation under our non-Teamster retirement plans, and contributions to our profit sharing retirement plan have been made for 24 years without interruption.

As part of their organizing strategy Teamsters have sold long-service employees on the past service retirement credits which would accrue to them by joining the union. Of course, those past-service credits are liabilities to employers like Coles who must participate in funding the enlarged base created by the Union organizers. These new and additional liabilities were assessed to the plan, but never with our sanction.

If Coles Express chose or were forced to contract substantially, or its employees chose to be represented by a union other than the Teamsters, or if the company were shut down by a strike of any duration and were unable to reopen, a past service liability up to its entire shareholders equity of $3 million could be payable to a

Multi-Employer Pension Plan benefiting only 62% or 184 employees, placing approximately 100 non-Multi Employer employees at Coles Express out of work. Should there be any reason in the world why a company like Cole Enterprises, or its other non-multi employer subsidiaries have their corporate assets confiscated and the jobs of its employees confiscated in assuming the liability of a minority of its employees?

We estimate now that our pre-1980 liability is in the area of $2,851,000, using information supplied by the Teamsters Plan. If Coles Express were not able to raise this amount, however, this liability extends under present law to the capital, net worth, and job security of those independently managed sister companies. Surely, to create a situation where the future viability and jobs of a company are in jeopardy because of a common ownership with another company who is a contributor to a Multi-Employer Plan, is wrong. What is particularly disturbing about this enormous liability is that it was never the subject of bargaining. What was bargained was the level of contributions by the company to the Teamsters Plan, not the unseen level of expense necessary to fund promises over which we had no control.

It has been and continues to be a source of pride to all our shareholders that we have paid no dividends since the company's founding in 1917 and that we have over the years reinvested all of our earnings in the business. Now we find that in a time of increased business risk, the capital prudently accumulated in the business is only ours if we continue in business as before. If the new and growing competition forces us to contract substantially, our company could be bankrupt. Because of withdrawal liability, our bargaining position with the Teamsters Union in order to reduce our costs in contract negotiations is greatly weakened. Should we be forced to close our doors from competitive pressures brought on by the Motor Carrier Act of 1980, not only will the jobs of Coles Express' other employees be forfeited along with the net worth of its shareholders, but the future and 135 jobs of another company, A. J. Cole & Sons, another subsidiary of Cole Enterprises, will be in jeopardy as well.

Although I have confined my remarks to the effects of this law on Coles Express, I am sure that there are thousands of other small, family owned companies throughout the country who find themselves in a similar situation.

Coles Express prides itself on its responsibility to its employees and to the public in the communities it serves. Should some new regulation be implemented requiring Cole to cover the full present and future costs of its own Teamster pensions, we would certainly recognize that obligation, step up to it, and if necessary engage in collective bargaining with respect to it. The inequity posed by this present law is that we have not had such an opportunity in the past, and have therefore not been able to price our services or recognize this liability. And yet, all the interests of our shareholders, the public, and the majority of our employees are made subordinate to those Teamster members of a Multi-Employer Pension Plan.

To recap, I would say in 1980, with the Motor Carrier Act, Congress took away the major asset of our company, the value of our operating authority. It allowed the hundreds of new non-Teamster companies to enter the market previously controlled basically by the Teamsters Union. That same year the Multi-Employer Pension Plan Amendments Act set up liabilities for us Teamster companies that exceed nearly every carrier's net worth. With a small Teamster trucker not being able to compete long-term on the one hand with non-Teamster competitors and on the other hand with the trucking giants, the Multi-Employer ERISA law prohibits the owners from closing down without complete confiscation of the company's assets.

In the case of Coles Express not only are its assets in jeopardy, but also the assets of its parent company seriously affecting the jobs of employees who have no Multi-Employer retirement. I can't believe Congress ever intended to put a majority of any corporation's employees out of work to satisfy non-negotiated retirement benefits for a minority of any company or group of companies. Further, I can't believe it was Congressional intent to take a company who has had nearly 50 consecutive profitable years, never declared a dividend, and confiscate all of its assets in order to fund retirements for only 42% of its employees.

I beg of you to pass S1748 and HR5223 which will correct this, the most anti-business legislation in the history of the United States Congress.

Senator NICKLES. Thank you, Senator Cohen. We appreciate your input in these hearings and also as the legislation will progress.

We are also delighted to have Senator Hatch with us, who is chairman of the Senate Labor and Human Resources Committee, and author of Senate bill 1748.

Senator Hatch, do you have comments?

Senator HATCH. Thank you, Mr. Chairman.

From the perspective of the American business community, the bill which we are considering today may be the most important and vital one, in the 97th Congress. I say this not on the basis of my sponsorship of the bill, but entirely on the reaction which the measure generated in both Congress and the private sector.

For these hearings alone, we have received over 100 requests to testify. The committee has easily had over double that number in the way of inquiries from companies, law firms, trade associations, and congressional offices.

It is clear from all the comments, and especially from the testimony to be presented today, that the 1980 Multiemployer Pension Plan Amendments, which S. 1748 amends, have caused an incalculably large rift in our free enterprise system.

Actually, the problem did not spring up overnight, in the wake of the 1980 ERISA legislation. The seeds were planted decades ago, when Congress sanctioned the multiemployer pension system and required that such plans be jointly administered by union and management trustees. Trustees designated by employers became responsible for establishing benefits levels, investing plan assets, and generally controlling administration. Employers themselves, for practical as well as legal reasons, had little interest in overseeing or controlling these pensions. As defined contribution plans, these plans merely required that employers pay the contribution rates which had been negotiated with the employees' unions. The liability of the employer did not extend beyond that, to guarantee in any way the benefits which the independent trustees of the plan had set.

This essentially contractual system of rights, duties and expectations was radically changed, however, by the 1974 ERISA legislation. Under the title IV insurance provisions of that act, employers became potentially liable for paying a portion of the benefits promised by trustees to retired employees. Liability would be actualized where an employer found itself contributing to a grossly underfunded plan.

Underfunding could be a result of a variety of factors, but at the heart was the fact that the trustees had erred, often irresponsibly so, in promising benefits which could not be financed by the contributions.

Ironically, the 1974 legislation, rather than helping to infuse new capital into many ailing plans, actually stanched the flow of contributions. To preserve settle expectations and avoid liability, employers saw the advantage of withdrawing from multiemployer plans. This, of course, would simply accelerate the demise of an ailing plan, especially in an economically declining industry.

It was against this background that Congress in 1980 sought to shore up the system again. But, as is often the case, Congress demonstrated its unique ability to develop cures that are worse than the disease. We are used to that around here. To discourage employer withdrawals from multiemployer plans and to infuse additional resources to overextended plans, Congress embraced the concept of withdrawal liability. But as the experience of the last year has dramatically demonstrated, this concept has wreaked havoc among American industries. Companies, small and large, oftentimes through the course of ordinary business transactions, some of which are behond their control, are being assessed liabilities which shock anybody's conscience. Their very assessment so dramatically upsets settled, contractually established expectations of parties as to be unfair. Moreover, their very exorbitance is inequitable, bearing no reasonable relationship to an employer's previous contributions or the benefits which the plan may ultimately pay to the employer's work force.

The legislation which I have introduced is admittedly radical surgery, but we clearly face a crisis situation, and a decisive response is in order. It may not be the ultimate solution to the problem. However, it sets the stage for a thorough exploration of what is seemingly becoming an insoluble problem—one whose solution will have to strike an equitable balance between the need to protect the pensions of retirees and the need to protect the security and integrity of business transactions which are the heart of our free enterprise system.

So, Mr. Chairman, I am personally very grateful to you for calling these hearings, and being willing to listen to all of the witnesses in these hearings, as we see just exactly what are the best approaches to resolving these very inequitable difficulties that we have. And I am grateful to you for doing it, I am grateful to Senator Cohen and his leadership, as well, and for his excellent statement here today.

So with that, Mr. Chairman, that is all I have to say for now.

Senator NICKLES. Thank you, Senator Hatch. We appreciate your statement, and we realize you are not feeling that well, too, so we appreciate even more your appearance before our committee today.

Our first panel today is from the American Trucking Association. Gentlemen, we welcome you.

I am going to ask all of our panelists today if they would do this subcommittee a favor and not read their statements verbatim. We have 16 witnesses, and we are going into session shortly. It is imperative to finish this hearing today and give everybody a chance to appear before the subcommittee.

I have read the statements of the individuals who will be testifying, and Senator Cohen is familiar with the trucking industry, and Senator Hatch is very familiar with the problems that are before us today. We will enter each of your statements in the record as if read, so they will be in the record in their entirety. You can basically give us any additional comments that you might wish to, and that will give us the opportunity to be able to ask you a few questions.

I apologize for the necessity to run this hearing very quickly this morning, but we do have very important pending business on the Senate floor today that will compel our attendance, and to be fair to the third, fourth and fifth panels, it will be necessary for us to move on a quick pace.

Gentlemen, if you would identify yourselves, and you can begin left to right, and make what comments you wish. I will ask, and I think our staff has previously asked, that no one take more than 5 minutes to make their initial comments.

Mr. Ryder, would you care to begin?

STATEMENT OF HOWARD W. RYDER, COASTAL TANK LINES, INC.; DAVID W. HOWELL, THE WILLET CO.; HERB AIKEN, AMERICAN TRUCKING ASSOCIATION; HARRY BRODEUR, AMERICAN TRUCKING ASSOCIATIONS: HUGH C. SHURTLEFF, TIME-D.C.; KEITH FULTON, JR., KEITH FULTON & SONS, INC., A PANEL

Mr. Ryder. Yes. Good morning, Senators.

My name is Howard Ryder. I am president of Coastal Tank Lines of Akron, Ohio, and a vice chairman of the board of directors of the American Trucking Association.

We represent common, contract, and private carriers of freight, moving in interstate commerce throughout the United States.

I am here today with a panel of trucking company executives, to tell you as emphatically as I can that the Multiemployer Pension Plans Amendments Act is not working as Congress intended.

Each of us has a printed statement, which we ask to be inserted in the committee's record, and in the interest of the committee's time, each of us is prepared to present an oral summary of our prepared testimony.

The impact of this act on the financial health of the unionized trucking companies has been devastating. Unless it is changed, it will cause severe damage and may cause the demise of the very pension plans it was designed to protect.

The trucking industry's answer to the problem we will describe today is S. 1748. I want to publicly commend Senator Hatch, chairman of the Labor and Human Resources Committee, and those other Senators who have joined him as cosponsors.

Gentleman, the problem is withdrawal liability. It damages unionized companies that must go out of business, as well as those that remain in business. Its mere existence as a contingent liability makes it impossible to buy, sell, merge, or consolidate businesses. The ability of companies to borrow money is impaired.

The 1980 legislation amending the 1974 act made a number of changes, the effect of which was to enlarge the debt which most pension plans carry for vested benefits. By increasing this obligation, however, Congress failed to enact a workable system for the payment of benefit guarantees. For one thing, no one knew what the size of these obligations would be.

Nevertheless, Congress placed the burden for the payment of these enormous liabilities squarely on the backs of the employers. This burden has impaired labor agreements sanctioned by the national labor law, and has created an enormous disincentive for employers to maintain or join multiemployer funds.

It should be noted that unfunded liability consists of two parts: that which is attributable to the service of the company's employees, and that which is attributable to the rest of the plan's participants. The amount of this liability can be very large--sums like $10,000 and $20,000 and more per employee are commonplace.

Thus, the imposition of a legal requirement to pay withdrawal liability for unattributable liabilities places the employer who must withdraw from the pension fund for normal business reasons in the unjust position of paying for the benefit costs of other companies' employees.

Back in 1980, American Trucking Associations voiced its opposition to the establishment of withdrawal liability. We asked for an exemption. We reasoned that for the healthy pension plan, the collection of any withdrawal liability would be windfall money, because in such plans, benefits are adequately supported by contributions.

We believe that the collective-bargaining agreement should continue to be the sole basis for making adjustment in the pension plan's funding requirements. Sick plans should continue to be covered by the act's funding and reorganization requirements and not by withdrawal liability.

We also felt that withdrawal liability would inhibit many basic business decisions. However, our efforts to obtain a workable trucking industry exemption did not really succeed, and the intent of Congress to permit trucking companies to avoid withdrawal liability in plans which do not need the money has been entirely frustrated.

The disastrous impact of withdrawal liability can best be illustrated by example, and on page 4 of my statement, I cite nine instances of damage.

I am joined today by individuals who will demonstrate the damages of withdrawal liability--the story of a frustrated merger; the story of a liability triggered by Government seizure of company property; the story of a liability incurred because the employees decertified the union; and finally, an account of a partial liability brought about by the loss of a Government contract.

The Central States Teamster plan's executive director says that they had assessed more than $150 million of claims against better than 185 companies. To date, all they have collected are lawsuits and very little money. As of March 1, we recorded 68 lawsuits which test the constitutionality of the liability provisions, 35 of them by trucking companies. We believe the list will continue to grow and have since learned that since March 1, 10 additional suits have been filed.

Senators, we cannot go on this way——

Senator HATCH. That is 78 suits?

Mr. RYDER. Yes, Senator, 78 suits as of yesterday.

We estimate that if total withdrawal liabilities are recognized, the entire unionized trucking industry will have a negative net worth.

Our answer to this devastating situation is S. 1748. It is a simple, straightforward proposal. Its purpose is to stabilize the pension plans which are threatened by the amendment act's withdrawal liability provisions. We believe it will restore the ability of multiemployer pension plans to attract new groups of employers, without which it cannot survive. The bill does not change the other important features of ERISA, such as coverage, vesting and funding. The bill would remove those employers who have only bargained contributions in their collective-bargaining agreements from the withdrawal liability and plan termination insurance provisions of the act. This would remove the disincentive which employers now have from agreement to contribute to multiemployer pension plans.

Gentlemen, the trucking industry urges your favorable action on S. 1748.

Senator NICKLES. Thank you, Mr. Ryder.

[The prepared statement of Mr. Ryder follows:]

STATEMENT OF HOWARD W. RYDER ON BEHALF OF AMERICAN TRUCKING ASSOCIATIONS, INC. BEFORE THE SUBCOMMITTEE ON LABOR, SENATE LABOR AND HUMAN RESOURCES COMMITTEE, MARCH 11, 1982

My name is Howard W. Ryder. I am President of Coastal Tank Lines of Akron, Ohio, and a Vice chairman of the Board of Directors of American Trucking Associations, Inc. (ATA), the National Trade Association of the Trucking Industry. ATA has affiliated trucking associations in each state and the District of Columbia and thirteen affiliated conferences representing the various segments of the industry. Together, we represent the common, contract,and private carriers of freight moving in interstate commerce throughout the United States. Since January of 1980, I have been Chairman of ATA's Special Committee on Employee Benefits Legislation.

I am here today heading a panel of trucking company executives to tell you, as emphatically as I can, that the The Multi-Employer Pension Plans Amendments Act (MPPAA) is not working as Congress intended. The impact of this Act on the financial health of the unionized trucking companies has been devastating. If the Act is left unchanged, ultimately it will cause the demise of the unionized trucking companies and the very pension plans it was designed to protect.

The trucking industry's answer to the damage which I shall describe today is S.1748, the Multi-Employer Pension Plan Stabilization Act of 1982. I want publicly to commend Senator Hatch, Chairman of the Labor and Human Resources Committee, and those other senators who join him as co-sponsors in this legislation.

Let me make it clear that we have a mutual interest with our unions in the health of the pension plans to which we contribute. We would not propose a solution which would damage the wellbeing of our vested employees or the stability of pension plans in which our companies have invested so much. By-and-large, these plans are healthy and financially stable. They offer workers some of the richest benefits in American industry. Benefit delivery has never been one of their problems.

THE PROBLEM - WITHDRAWAL LIABILITY

Our essential problem with MPPAA is that new legal concept called withdrawal liability, which damages those unionized companies which must go out of business, as well as those unionized companies which remain in business. Its mere existence as a contingent liability makes it difficult, if not impossible, to buy, sell, merge or consolidate businesses. Finally, it has a negative impact on the movement of capital and reduces the ability of companies to borrow money.

The timing of this legislation was unfortunate and ironic. In July of 1980 the Congress passed the Motor Carrier Act, which reformed economic regulation of the industry and created much new competition. Weeks later Congress enacted MPPAA.1/

1/Former Interstate Commerce Commissioner Thomas Trantum, in a statement before the Joint Economic Committee of the Congress on November 17, 1981, said, "At this point I would like to mention one additional development. The Multi-Employer Pension Plan Amendments Act of 1980 made a partially or wholly withdrawing employer immediately liable for up to 100% of its net worth. Previously, withdrawal liability was limited to 30% of net worth over a period of time. In effect, the amendments Act has made it very difficult for carriers to transfer assets, as well as move facilities from one area to another. As such, carriers face a new barrier in adjusting to market circumstances contrary to the intent of the Motor Carrier Act of 1980. I, therefore, urge Congress to review this matter and search for a solution."

The recession has been a third unfortunate factor. As a result of deregulation, with or without recession, we have too much truck capacity for the freight there is to haul. Some of us cannot stay in business. However, as a result of MPPAA neither can we afford to go out of business.

In the trucking industry, our labor agreements provide for pension contributions and are designed with a common-sense understanding of the needs of our employees, who for the most part work for small businesses. For every trucking employer that fails, someone replaces him to haul his freight, and to employ his employees. Contributions and pensions are both preserved. This has been the nature of our business for decades.

From the beginning the limit of the trucking employer's pension liability was his negotiated contribution to the pension plan under the terms of the labor agreement. There is no part of this country not covered by area wide labor agreements requiring the unionized trucking company to contribute to pension plans for his employees. It is all but impossible to avoid these obligations. Moreover, the Teamsters are hard bargainers, and they have seen to the security of the employee's interest.

THE LIABILITY CHRONOLOGY

With few exceptions, multi-employer pension plans in the trucking industry have been financially sound plans. In contrast to single employer plans, our multi-employer plans have seldom been terminated. The reasons for this stability include: employer willingness to join such plans because his liability was fixed; trustee ability to adjust pension benefit levels when it was necessary; and a broader basis of contributors than single employer plans where the termination of one employer also terminates one plan.

In order to prevent certain isolated abuses, Congress changed the rules under which plans operate. By passage of ERISA in 1974 what were defined contribution plans became defined benefit plans. Coverage was extended. Vesting was tightened up and made universal. Twenty-year vesting practices were reduced typically to ten years. Funding requirements were established. A plan termination insurance system began. If an employer terminated his plan, he was required to make good on his promise to secure at least a portion of his unfunded vested benefits. His liability was limited to thirty percent of his net worth. All of these actions affected the funding conditions of plans.

ERISA also covered multi-employer plans; however, the Pension Benefit Guaranty Corporation's (PBGC) coverage of such plans under the termination insurance system was left discretionary. Congress correctly noted that almost no multi-employer plans had been terminated with any loss of benefits.2/

The 1980 legislation amending the 1974 Act made the coverage mandatory for multi-employer plans and further expanded the employer liability for such plans. The thirty percent limit on net worth was changed to 100 percent for such plans. The reasons for making good on liability were expanded from plan termination to plan withdrawal. The cost of carrying the unfunded vested

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2/A U.S. Department of Labor study referenced in the record of the ERISA legislation showed that in a six-year period seventy-nine multi-employer plans terminated out of a universe of 2,000. Nearly all of these plans involved the merger of weaker plans into larger, more stable plans. In three of the seventy-nine plans, there were benefit losses affecting a total of 540 workers out of the 8 million worker universe in the multi-employer plan system, a loss of less than one one hundreth of a percent.

benefit obligation on which liability is calculated was expanded by shortening amortization from forty years to thirty years. The effect of these changes again was to enlarge the debt burden which most pension plans of this type carry for vested benefits.

By increasing these rights and entitlements, however, Congress failed to enact a workable system for the payment of these benefit guarantees. The unfunded vested benefit obligation levels now increased dramatically because of new benefit increases adopted by trustees, and a shrinking in the number of new employer entrants into the plans. Failing to comprehend the size of these obligations, the Congress placed the burden of payment for these enormous liabilities squarely on the shoulders of employers whose agreed upon liabilities had been defined and limited by the labor agreement. The imposition of this burden by the Congress not only has impaired labor agreements sanctioned by the National Labor Relations Act, but the burden also has created an enormous disincentive for employers to maintain or join these plans.

It should be noted that unfunded liability consists of two parts: that which is attributable to the service of the employer's employees, and that which is not so attributable. Among unattributable liabilities are the costs of servicing entitlements of former employees of defunct employers, past service credits of other employers as yet unsupported by employer contributions, but which have been granted to workers to persuade them to join the union, uncollectable contribution amounts, and costs arising from the practice of shifting employees of other employers from a lower class of contributors to a higher premium and benefit level. These liability sums can be very large. Sums like $10,000, $20,000 and more per employee are commonplace. They are aggravated if plan actions to increase liability are granted during an up-swing in the economy, only to be funded during a down-swing. Thus the imposition of a legal requirement to pay withdrawal liability for unattributable liabilities is extremely unfair, for it places the employer who must withdraw from a pension fund for normal business reasons in the unjust position of paying for the benefit costs of other companies' employees.

THE TRUCKING INDUSTRY EXEMPTION FAILURE

Many businessmen concede the wisdom, if not the necessity, of the objectives of the ERISA law. However, withdrawal liability is another matter. Going into 1980, American Trucking Associations voiced its opposition to the establishment of withdrawal liability. We reasoned that for the well run pension plan, the collection of any withdrawal liability is windfall money, because in such plans benefits are adequately supported by contributions from the industry. We think that the collective bargaining agreement should be the sole basis in a free economy for making adjustments in the pension plan's funding requirements. Sick plans should be handled by the Act's funding and reorganization requirements, but not by withdrawal liability.

Accordingly, in 1980 we did not see ourselves as that much much different from the construction industry, which also saw a need for an exemption from liability. While it is said that MPPAA had wide support from the business community, most of this support came from business organizations not directly covered by the amendments. They saw in the Act's passage an insulation of single employer plan obligations from some of the perceived problems of the multi-employer plan sector. The construction industry and others supported the legislation because they had obtained the promise of an exemption from withdrawal liability to apply in most business transactions.

Our efforts to obtain a partial trucking industry exemption did not really succeed. The exemption was intended to work in almost all trucking industry plans.3/ The exemption would not

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3/ERISA SECTION 4203(d).

apply if it could be shown that the withdrawal damaged the contribution base. The exemption was to apply in trucking industry plans in which substantially all the contributions are received from trucking companies. Some legislative history was added to the record in the House of Representatives by Congressman Thompson. This history shows that "substantially all" means 85 percent. The acceptance of this term wrongfully guts the trucking industry exemption by making it unavailable in all but two small trucking pension plans. PBGC ignored the legislative history in the Senate record which makes clear that the exemption was intended to be available in almost all Teamster pension plans. The effect of the disagreement is that the trucking industry exemption is meaningless.

At best the trucking industry exemption carries a business risk impossible to calculate, because it imposes a liability after the fact.4/ So the intent of Congress to permit trucking companies to avoid withdrawal liability for plans which do not need the money has been entirely frustrated.

THE MPPAA DAMAGE

The disastrous impact of withdrawal liability can be best understood by illustration:

1. A widow in Tennessee attempted to operate her small company for a year after her husband's death. Failing to make a profit, she liquidated the operation in mid-1980, just prior to the signing of the Amendments Act. The $100,000 net value of her assets represented her personal retirement fund. The withdrawal liability billing she received was double the value of her husband's estate. Discussions with the trust fund reduced the billing to $96,000. She is in court now to prevent this unreasonable taking of her private property.

2. A private carrier retired its last union employee before turning its business over to a common carrrier. It stopped contributions to the pension plan as the labor agreement permitted. The manager received a substantial withdrawal notice.

3. A household goods mover liquidated a subsidiary in 1979, more than a year before the commencement of the liability clause of the Act. There was a dispute about some unpaid contributions to the pension plan. The union insisted that the employer was delinquent in his contributions. Inasmuch as the dispute persisted into 1980, the pension plan declared a withdrawal and sent a bill for $800,000, a sum much larger than the disputed contribution amount.

4. Johnson Motor Lines was closed by its owners, Republic industries who testify before you today. The pension plan assessed a retroactive liability of $16.6 million, which was twice the size of the assets of both Republic and Johnson. Under the punitive calculation formulas of the Act, Johnson was given five-and-one-half years to discharge the liability. The first monthly installment was to be $250.000, which if paid, even over a few months, was itself enough to trigger a financial crisis for the owners.

4/Even assuming that a pension plan determines that it is a trucking industry plan within the meaning of the language of the trucking exemption, the "exempt" trucking company must post a bond, probably fully collateralized, for half the amount of the withdrawal liability. It must then wait as much as five years for a PBGC decision that its withdrawal coupled with other withdrawals has not damaged the contribution base of the plan. A PBGC decision in the negative causes forfeiture of the bond and requires immediate payment of the remainder of the liability, probably with interest compounded at the prevailing rates. If PBGC makes no decision, the exemption stands. ERISA, Section 4203(d)(4).

5. A Northeastern trucking company has had a vigorous acquisition policy. Having bought numbers of trucking companies over a twenty-year period, it has provided an effective transportation service to the public in its area of operation. By so doing, it has also preserved the jobs of numbers of Teamster employees who had built up credits in the New England Teamster's Fund through service with their former employers. The company remained profitable by effecting economies through elimination of duplicate points of operation. The Act makes it impossible for the company to continue its acquisition policy.

6. A Michigan trucking company, in business since the '30s, and affected by declining profits and the depressed condition of the automobile industry, closed its doors in late 1980 It has received a $2.5 million bill for withdrawal liability. That sum is three times its net assets.

7. A California manager faced with the advanced age of his employers, was directed to sell the company in order to recoup its remaining assets for the family stockholders. Among twenty serious buyer prospects, none failed to ask about withdrawal liability, and to this date the company is not sold.

8. A trucking company decided to relocate a terminal from one side of Pittsburgh to the other, so that it could be located closer to the scene of shifting business opportunities. In so doing, it proposed to leave one pension plan area and enter another, where it would continue to make pension contributions. The first plan has warned that it will assess partial withdrawal liability. The company has decided it cannot afford to make the move.

9. Miller Transporters of Jackson, Mississippi, purchased a failing company, Wheeling Pipeline. Even though both companies had made payments to the pension plan faithfully for years, each was required to post bonds totaling $800,000 in order to guarantee payments of further contributions to the plan. If Miller changes its operations to effect economies by reducing inefficient operations, the bond will be forfeited and withdrawal liability will be assessed.

These are but a few samples of the literally hundreds of cases of damages brought about by this Act. I have listed the harm done to companies struck by retroactive features of the liability provision, to those who for financial reasons should quit but cannot, to those who want to move or consolidate operations but cannot, to those who want to buy or sell, but cannot.

I am joined today by people who will give further detail to the damages of withdrawal laibility: A story of a frustrated merger. The story of a liability triggered by government seizure of company property. The story of a liability incurred because the employees of the employer decertified the union. Finally, an account of a partial liability brought about by loss of a government contract.

The Central States Teamster Plan's Executive Director says it has assessed more than $150 million of claims against better than 185 companies. To date, it has collected lawsuits, but little money. As of March 1, we recorded sixty-eight lawsuits which test the constitutionality of the liability provisions, thirty-five of them by trucking companies. Seventeen cases were added to the list in February. We think the list will soon reach one hundred, as more trusts implement withdrawal procedures.

Senators, we cannot go on like this. We estimate that if total withdrawal liabilities are taken into account, the entire unionized trucking industry is in a negative net worth position.

S. 1748 - THE STABILIZATION ACT

Repeating my opening remarks, I assert that the trucking industry's answer to this devastating situation is S.1748. It is a simple, straight-forward proposal that aims to restabilize the pension plans which are threatened by this Act's withdrawal liability provisions. The idea is to restore the ability of the pension plan to attract new groups of employers, without which it cannot survive. The bill does not change the other important features of ERISA, such as coverage, vesting, and funding. The bill will remove employers which have bargained only contributions in their collective bargaining agreements from the withdrawal liability and plan termination insurance provisions of the Act. This should remove the disincentive which employers now experience from agreeing to contribute to multi-employer pension plans.

There seems to be a concern that the bill will somehow injure retirees and participants by damaging benefit guarantees. It seems more important in our estimation to acknowledge that the damage mechanism is in the present Act.

Some think the bill will increase the risk to PBGC. This is not so. Our very large pension funds are not even insurable against plan termination. The demise of even moderately large pension plans cannot be handled by PBGC's meagre resources.

Gentlemen, the trucking industry urges your committees' favorable action on S.1748.

Senator NICKLES. Mr. Shurtleff, would you like to give your statement at this time?

Mr. SHURTLEFF. My name is Hugh C. Shurtleff. I am president of TIME-D.C., Inc., a motor carrier located in Lubbock, Tex.

I appreciate very much the opportunity of being here today and testifying before your committee.

TIME-D.C. has authority to serve all points within the 48 States. We have about 2,500 employees, and our revenues in 1981 were about $170 million.

I have been in the trucking business for more than 35 years. I feel that the problems created by the Multiemployer Pension Plans Amendments Act of 1980 created more problems than all of the other problems during this 35 years for the trucking industry.

Early in 1981, the owners of TIME-D.C. negotiated and discussed at length the possibility of merging that company with the operations of East Texas Motor Freight Lines, a common carrier located in Dallas, Tex. The results of those investigations indicated a savings of between $14 and $18 million, if the two operations could be combined. Both companies were at that time losing money, but the $14 to $18 million of savings would have resulted in a profitable carrier. The public would have benefited in that the service would have been improved, and the financial stability of the remaining carrier would have been strong. The employees would have greater security, and the shareholders would have benefited.

We negotiated that matter for a number of months. Finally, in April, we made an announcement relating to a tentative agreement under which the assets of TIME-D.C. would be sold to East Texas Motor Freight Lines. We then studied and found, to our detriment, that we could not effect that transaction. The risk of potential liabilities were so great that it was determined that the combination of these two carriers was not a practical thing to do.

We called off the transaction in its entirety in May. During that period of time, of course, we lost key sales and management personnel, and we lost business.

Now, the trucking industry is made up of over 15,000 companies. The industry is a fairly young industry, one that is highly fragmented and one that is very competitive, and it is necessary and desirable for a consolidation to take place. But this Amendments Act of 1980 makes it virtually impossible to buy, to sell, or to merge, and therefore, the 15,000 carriers are in a frozen position, so that we are unable to carry on normal mergers or combinations of the various small companies.

Our liability is computed at about $30 million. Our net worth presently is between $16 and $17 million. Not only are we prohibited from buying or selling or combining our operation, but we are facing, and in the future will face more difficult problems of securing credit. The bankers are just now beginning to understand the implications of the Amendment Act of 1980, and bankers will not, in my judgment, in the future loan funds to companies that have potential liabilities that are greater than the net worth of such companies.

I respectfully suggest that favorable consideration be given to changing this amendments act so that we can sell, we can buy, we can merge, and we can borrow money.

Thank you very much, Senator.

Senator NICKLES. Thank you, Mr. Shurtleff.

[The prepared statement of Mr. Shurtleff follows:]

TESTIMONY OF HUGH C. SHURTLEFF, PRESIDENT OF T.I.M.E.-DC, INC., BEFORE THE LABOR AND HUMAN RESOURCES COMMITTEE OF THE U.S. SENATE

My name is Hugh C. Shurtleff and I am President of T.I.M.E.-DC, Inc., a common carrier by motor vehicle with general offices located in Lubbock, Texas. I have been President of T.I.M.E.-DC since May, 1975 and have worked in the trucking industry since 1946. I appreciate very much the opportunity of appearing and testifying before this committee.

T.I.M.E.-DC is a common carrier by motor vehicle with authority to serve all points in 48 states. The company has 93 terminals, and approximately 2,500 employees. The number of employees presently is considerably less than in prior years due to the current recession and due to the competition which we have experienced from additional trucking companies entering the business since the enactment of the Motor Carrier Act in 1980. T.I.M.E.-DC was formed in 1969 through the merger of three major carriers: T.I.M.E. Freight, headquartered at Lubbock, Texas; Denver-Chicago with its general offices in Denver; and Los Angeles-Seattle Motor Express with its general office in Seattle, Washington. Those prior companies had generally been in business since the 1930's and therefore, T.I.M.E.-DC and its predecessors have been in business for more than 40 years. Our 1981 revenues were approximately $170 million.

I have been in the trucking industry for about 35 years and I feel that the problems created as a result of the Multiemployer Pension Plan Amendments Act of 1980 are greater than any and all of the problems that the trucking industry has faced during the last 35 years.

Early in 1981 the management and owners of T.I.M.E.-DC carried on extensive negotiations with the owners of East Texas Motor Freight Lines headquartered in Dallas, Texas, relative to the possibility and desirability of combining the two operations. The proposed transaction -- a purchase by East Texas of T.I.M.E.-DC's assets -- promised substantial benefits for both parties. T.I.M.E.-DC and East Texas were, at that time, suffering business losses due, in significant part, to new competition resulting from deregulation of the trucking industry.

In addition, the trucking routes operated by T.I.M.E.-DC and East Texas were identical in many areas where the two companies do business. By combining the two companies, East Texas would have been able to consolidate terminals, adopt other cost-cutting efficiencies, and become a financially much stronger carrier, far more able to compete in the marketplace. Indeed, detailed cost and marketing projections showed that consolidation could eventually reduce costs by $14 to $18 million annually, a savings that would have easily outstripped the combined losses of the two companies operating separately. As a much stronger carrier, East Texas would have been able to provide better service to the shipping public, and would have provided much better job security for employees of both companies. The shareholders of both companies also would have benefited: East Texas shareholders would have gained because the company would have been placed in a far stronger financial and competitive position; and T.I.M.E.-DC shareholders, of course, would have seen an end to the deterioration of their investment as the result of losses in the company's trucking operations.

Because of the substantial business advantages of the proposed sale, the parties explored it vigorously and negotiated intensively for several months. We were able to reach agreement on virtually every major aspect of the proposed sale -- in fact, we reached a tentative agreement in April, 1981, and we even announced the tentative agreement publicly on April 14. But in the end, we were unable to resolve one issue: the withdrawal liability provisions of the 1980 Pension Amendments Act. After careful investigation, we could find no way to structure the transaction without creating an unacceptably high risk that subsequent events could cause either T.I.M.E.-DC, or East Texas, or both, to be deemed to have "withdrawn" from one or more of the pension funds to which both companies contribute. The potential liability for such a "withdrawal" was enormous -- our estimates at the time showed that it could be as much as $30 million.

This liability should be compared with T.I.M.E.-DC's current net worth, which is less than $16 million. Such a huge liability would have destroyed the business and financial advantages of the proposed sale, and the negotiations were finally broken off in May of 1981. As a result, both companies, their employees and shareholders, and the shipping public, all have been injured solely because of the Multiemployer Pension Plan Amendments Act. This result is unconscionable, because neither T.I.M.E.-DC nor East Texas ever agreed to be liable to any pension fund except for their collectively-bargained agreements to make contributions to the funds at negotiated rates -- agreements that both companies have regularly and faithfully satisfied.

The trucking industry is a highly-competitive one, consisting of 15,000 or more trucking companies throughout the United States. It is a young industry compared with industries generally throughout the United States, having really started in the 1930's and 1940's. Consolidation of trucking companies is necessary to benefit from the economies of scale and to provide to the shipping public motor carriers with greater financial responsibility and to its employees more job security. The Pension Amendments Act makes it virtually impossible and certainly impractical to either buy or sell, and consequently prohibits the necessary consolidation within the trucking industry. The company has agreed to collective bargaining arrangements over the years whereby its total liability to the pension funds was limited to a fixed contribution of so much for each employee. Generally, that contribution level is now about $2,600 per employee per year. Such contributions, we thought, represented our total liability in that T.I.M.E.-DC had no ability to determine the level of benefits promised by such funds.

The Pension Amendments Act will also have the result of making it difficult, if not impossible, for many companies to secure loans and necessary credit for their operations. When they realize the full implications of the Act, the banks and other financial institutions will be very reluctant to loan funds to a company with a potential pension liability which is greater than total net worth. Liability of this size is not an isolated situation but one which is applicable to the great majority of trucking companies throughout the country.

I respectfully suggest that the Multiemployer Pension Plan Amendments Act of 1980 be changed so that normal purchases and sales to trucking companies can be accomplished without triggering withdrawal liability.

Senator **Nickles**. Next, we will hear from Keith Fulton, of Boston, Mass.

Mr. **Fulton**. My name is Keith Fulton, Jr., and I live in Winchester, Mass. I am pleased to have this opportunity to testify in support of S. 1748. I have submitted a complete written statement for this record.

As the previous owner and manager of a small trucking company, I can testify first-hand to the destructive impact of the 1980 Multiemployer Pension Plan Amendments Act on me as an individual citizen and on the ability of unionized businesses to operate in the marketplace.

My company, Keith Fulton & Sons, Cambridge, Mass., was started by my father in 1927. My brother and I joined him in the early forties, and together, over the years, we built our business into a profitable and solvent operation.

Our terminal in Cambridge had a garage, a rail siding, a 40-ton gantry crane for unloading and reloading railcars. We were classified as a specialized carrier and operated heavy duty tractors, flatbeds, and all types of lowbed trailers. We unloaded and trucked heavy articles from our terminal to various construction and industrial sites. We also moved some of our articles for shippers in the area to all points in the United States.

In January 1980, I was apprised by the city of Cambridge of the taking of our property in the not-too-distant future for a federally funded mass transit project. For months, I searched unsuccessfully for a suitable alternative location at an affordable price, based on what Cambridge had offered me for our terminal. I tried to sell my business, but because of the unique location which related to the operation, I was unsuccessful.

On November 10, the eminent domaintaking took place, and obviously, my only alternative was to cease operation, close the doors, and liquidate. The total liquidation value of my company was approximately $1 million. This was everything I owned.

On September 1, 1981, as a result of the Multiemployer Pension Plan Amendments Act of 1980, I received a demand for payment of withdrawal liability from the New England Teamsters' Pension Fund in the amount of $468,637.

Mr. Chairman and members of the committee, all I can say is that I did not believe it, not in this country. Here I am, forced out of business as a result of Government; then, I am told, by Government, that I must pay over 30 to 40 percent of my life's work to the pension fund. I cannot believe it was the intent of Congress to tell me that I had no rights to the full proceeds of my life's work.

Keith Fulton & Sons signed many collective-bargaining agreements over the years with local 379 of the Teamsters' Union, and through these contracts, contributed to the New England Teamsters' Pension Fund. I paid all wages, benefits and pension contributions which I agreed to. I had no say in any aspect of the fund—how it would be administered, managed, whether they would increase or decrease benefits, whether they would grant past service credits to other employees to induce them to join the union; I had no say in the method they used to determine the fund's assets and liabilities. I had no control over the trustees from creating liabilities without sufficient income.

I never agreed to pay for other employers' pension benefits or support other employers' future obligations. Now, Congress has passed a bill which says I must pick up the burden of all of these things that I never agreed to nor at any time was able to control. I am sure I lived up to my contractual obligations by paying the wages and benefits to my employees.

The pensions of my former employees are not in jeopardy. The New England Teamsters' Pension Fund takes in over $40 million more per year than it puts out. It has over $300 million in assets. Further, most of the work that my company did is now being handled by other union operators, and the fund is getting contributions for that work. At best, my withdrawal liability would be just a windfall, and I am sure that I will never know what happens to the money, and I am not sure how many others would.

In the interest of time, I was going to go on about the lawsuits, of which, of course, I am involved in one, but I think at this time it would be appropriate if I just simply say that I respectfully request that you act quickly and favorably on Senate bill 1748, because the longer it takes to remedy this injustice, the more it costs people like myself.

Thank you.

Senator NICKLES. Thank you very much, Mr. Fulton. We will ask all of the panel some questions as soon as we finish with the testimony.

[The prepared statement of Mr. Fulton follows:]

BEFORE THE SUBCOMMITTEE ON LABOR
OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

Testimony of Keith Fulton

March 11, 1982

Mr. Chairman and Members of the Subcommittee on Labor of the Senate Labor and Human Resources Committee:

I am pleased to have this opportunity to testify in support of S. 1748, a bill to remove the burdens of the pension guaranty provisions of ERISA from multiemployer pension plans, and to return questions concerning these pension benefits to the bargaining table, where they belong.

As the owner and principle manager of a small trucking company, I can testify first-hand to the destructive impact of the 1980 Multiemployer Pension Plan Amendments Act on the ability of unionized businesses to operate in the marketplace, and the consequent destruction of work opportunities for union members.

I. Keith Fulton & Sons, Inc.

My company, Keith Fulton & Sons, Inc., had been in business for more than 50 years in Cambridge, Massachusetts. My father started the business, and my brother and I joined him in the 40's. Together we built it up over the years. We were located on a piece of land with a rail siding and gantry crane, adjacent to the Boston & Maine railroad yard. We operated a number of heavy duty trucks to transport building materials and heavy machinery from railroad cars or other shippers, to construction sites or buildings undergoing renovation.

Keith Fulton & Sons, Inc. signed many collective bargaining agreements over the years with Local 379 of the Teamsters Union, and under these contracts contributed to the New England Teamsters and Trucking Industry Pension Fund.

On November 10, 1980, the City of Cambridge took my land by eminent domain (along with the adjacent railroad yard), for use in a federally-funded rapid transit project. I had anticipated the loss of my land, and had searched unsuccessfully for a suitable alternative location at an affordable price (based on what Cambridge had offered me for the land). I found none, and was therefore forced to liquidate my business. I am now working for one of my former competitors.

Just two weeks before the order of taking, Congress enacted into law the Multiemployer Pension Plan Amendments Act of 1980. This law permits pension funds like the New England Teamster Fund to assess a liability against any employer who goes out of business. This liability is based on the Fund's own estimates of the value of its vested benefits. The benefits of every employee in the Fund are included - the portion assessed against an employer bears no relationship to the benefits of that employer's employees. The employer is effectively foreclosed from challenging the Fund's assessment by the presumptions set out in the law. The Fund is policeman, judge, jury, and sheriff who collects the judgment. The total liquidation value of my company was about a million dollars - and the Teamsters Fund has demanded $468,637 of that.

Mr. Chairman, I worked my entire life to build that business, only to have it taken from me by the federal government for a mass transit project. I understand the necessity of mass transit, and I would be satisfied with a fair and just compensation for the taking. But on top of this, the government is also taking nearly 40% of the proceeds of my life's work to give to a pension fund for reasons that I can't understand.

Through all the years I signed the Teamsters contracts, I paid all the wages, benefits, and pension contributions which I agreed to. I always dealt fairly with my employees and the union, and I expected the same in return. I had no say in the management or administration of the Fund. I had no say when the Trustees increased benefits. I had no say when the Trustees granted past service credits to other employers in order to induce them to join the Fund. I had no say in the selection of any of the assumptions which were used to calculate the fund's assets and liabilities. I had no way to stop the Trustees from creating liabilities without adequate funding. But now Congress says I must pay my "fair share" of all those liabilities.

I must say to Congress that I paid my fair share in all the years I held to my contractural obligations. I paid my fair share by paying union wages and benefits to my employees. I never promised my employees that I would pay for other employers' pension benefits. I never promised them that I would support other employer's future obligations. But that is the practical effect of this law.

The pensions of my former employees are not in danger - the New England Teamsters Fund has over $300 million in assets and is growing each year. Most of the work my company did is now being handled by other union operators, and the Fund is receiving contributions for that work. Most of my former employees are now working, and may well be receiving additional pension benefits for that work. The only possible value my withdrawal liability would have is to provide a windfall to the Fund and to my former competitors - who now have to pay less to fund their employees' benefits.

When this law was enacted, no one took into consideration cases like mine where I was forced out of business. I was happy in business, I was making money, I enjoyed my work. All I know is trucking, and I was lucky to get another job in trucking. But it's not fair for you to be taking my money when I had no choice but to close down.

In a way, I was fortunate that the business owned its land. At least I will have something left after paying the pension liability. Many small operators are not so fortunate. They may be leasing their land and even leasing their trucks. Their only assets are their skills, knowledge of the business, and their willingness to take risks. Our country is built on small businesses like those. When you passed this law, you told us small businessmen that we didn't matter - we are expendable. I don't think that was right. This law is not fair. It is not just. And it should be repealed.

II. The Legal Background

Before ERISA was passed in 1974, multiemployer pension plans were a valuable protection for the transient union member in the trucking industry, and a cost-effective way for a small employer to provide pension protection to its employees. The employer's obligation was fixed and predictable - limited to the payment of a stated cents-per-hour amount as provided in his collective bargaining agreement. As the record before Congress in 1974 showed, multiemployer plans were far less likely to terminate than were single employer plans.

After ERISA was passed, multiemployer plans acquired a significant burden because of the new funding and vesting requirements. As a result, the hourly contributions required of employers increased, and some employers expressed a reluctance to enter into multiemployer plans. In addition, the termination liability provisions of ERISA led some employers to withdraw from plans, and severly damaged those plans in weak or dying industries. Even so, the vast majority of employers in the multiemployer plans stayed in and continued their commitments to make periodic hourly contributions. Termination liability was only a theoretical danger in a plan like the New England Teamsters plan, where it had millions of dollars of assets and those assets were constantly increasing.

The Multiemployer Pension Plan Amendments Act of 1980 came as a shock to those of us contributing to those plans. Now, our theoretical liability was real - and payable at any time we sold our businesses or were forced to close down for any reason. Rather than impose liability only on those employers who were running away from their obligations, this law swept into its clutches every unionized employer unfortunate enough to have joined these plans. It is no wonder that no employer with any awareness of this law will ever again join a multiemployer plan. The law will destroy the very plans it was designed to save.

III. Recommendations

Mr. Chairman, the bill introduced by Mr. Hatch will return the concept of multiemployer plans to its original purpose - to divert a portion of current wages to provide pensions for the mutual benefit of union members. Of course, the remaining provisions of ERISA will continue in effect to provide considerable protection for these benefits, which protection did not exist before 1974. Thus, ERISA will prevent multiemployer funds from being drained by imprudent investments and excessive administrative expense. The funding provisions of ERISA will ensure that there are sufficient funds in the vast majority of plans to pay future benefits. The removal of withdrawal liability burdens will again make multiemployer plans attractive to new employers and the contribution base of most plans will again begin to grow. And the fact that the security of future benefits will be somewhat dependent on the health of the unionized segment of an industry will necessarily make unions and their members more supportive of long-term solutions to our problems of productivity and foreign competition.

I have been told that there is some resistance to this bill on the part of some unions, who believe that multiemployer pension benefits need some insurance protection. If any insurance program is retained, it should be funded only by premiums from the plans themselves, and not by imposing liability burdens on employers who have no part in setting the benefits.

Any insurance protection should include some restraint on the tendency of plan trustees to increase benefits recklessly, and to grant extra benefit payments while the fund's contribution base is stagnant. Any insured plan should be forced to limit benefit increases to those supportable by the plan's expected contribution base. In this way plan trustees would be forced to be realistic in setting benefit levels to reflect industry performance, and the insurance program would be limited to its intended purpose - to protect plans from unexpected reductions in contributions.

Any legislative relief from the employer liability provisions must be retroactive to the effective date of ERISA, in order to be fair to those employers who were trapped by the inconsistencies and inequities of the prior law.

L78A/E

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APR 14

April 12, 1982

Senator Don Nickles, Chairman
United States Senate
Committee on Labor and Human Resources
Washington, D. C. 20510

RE: S. 1748 - Hearings held March 11, 1982
Testimony of Keith Fulton

Dear Senator Nickles:

On March 11, 1982, during hearings held concerning Senate Bill 1748, you asked our client Keith Fulton a number of technical questions. At that time, Mr. Fulton did not have available to him the particular data to respond fully to those questions. Therefore, at Mr. Fulton's direction, we take this opportunity to supplement his answers, and ask that this letter be entered as part of the record of the hearings.

1. The Calculation of Withdrawal Liability:

On March 11, 1982, you asked Mr. Fulton a series of questions concerning the calculation of his liability by the New England Teamsters and Trucking Industry Pension Fund (the "Fund"), comparing the $468,637 liability to his small workforce and low annual contribution committment. Mr. Fulton pointed out at the hearing that we were challenging the calculation of liability as well as the constitutionality of the liability payments themselves. We point out that there is an absence of any relationship between the burden of pension obligations by the Fund to Mr. Fulton's employees and the amount of his withdrawal liability. More important, however, is the need to make clear that the current law gives plan trustees unreasonable latitude in liability calculations, which calculations led to the liability amount imposed on Keith Fulton & Sons, Inc.

a. Multiemployer Funds and Vested Benefits

The New England Teamsters Fund, a multiemployer fund, was organized in 1958 by employer associations and Teamster Union locals. Employers were required to pay a fixed sum of money for each hour worked by covered employees. The employer associations and unions each appointed an equal number of Trustees, who were empowered to collect and invest the funds, to establish rules for administering the Fund, and to establish, raise and lower benefit levels in accordance with projections of the Fund's soundness. Thus, as the contribution base increased, benefits could be raised to reflect the higher expectation of income. If at some future time the contribution base were to decline, the Trustees could decrease benefits in order to maintain the overall actuarial soundness of the Fund. In no event were the Trustees permitted to assess additional amounts against employers or unions to provide or maintain benefits.

At any given time, a pension plan such as the Fund has "promised" to pay a certain benefit to each participant if the participant satisfies the vesting requirement of the plan and survives to retirement age. An actuary hired by the Fund places a value on that benefit taking into account the probability that the participant will die before retirement, and adjusting the benefit by an assumed interest rate, to arrive at a "present value" for the benefit. This "present value" may vary significantly depending on the interest assumption and mortality assumptions used by the actuary. The total of all the present values of benefits accrued under the fund by employees who have already vested is called the value of vested benefits. Subtracting the present value of the Fund's assets from that figure results in the "unfunded vested benefit" value.

The New England Teamsters Fund reported that it had calculated its total vested and unvested accrued benefits at the end of September, 1980 as in excess of $1150 million, that its net assets at that time were in excess of $380 million, and that its calculated value of unfunded vested benefits which it intended to assess against employers as of that date are more than $550 million, computed using a 7 1/2% interest assumption.

Many factors account for and contribute to the substantial spread between total assets and total vested benefits in multiemployer funds. They include, but are not limited to, the following:

1. The bifurcation of function between contribution setting and benefit-setting. Contributions are established by negotiation between employers and local unions, based on collective bargaining decisions related to wage costs rather than benefit levels. Benefits are established by the Trustees on the assumption that contributions will be sufficient to fund them over a thirty-year or forty-year period. Throughout the existence of the Fund, the Trustees have raised benefits for all

covered service, even that service accrued prior to the effective date of the increase. The Trustees have also routinely approved a "thirteenth benefit" payment, paid to all retirees each December, which has the effect of immediately drawing down assets to pay for benefits not only not vested, but not even accrued. Each of these decisions substantially increases the value of the fund's unfunded vested benefits even when immediately followed, or even preceded, by increases in employer contributions.

2. The Employee Retirement Income Security Act's (ERISA) imposition of more stringent vesting requirements than those previously contained in most multiemployer plans. As a result of ERISA's statutory requirement for earlier vesting, the unfunded vested benefit liability of many funds increased dramatically. For example, the Local 705 International Brotherhood of Teamsters Pension Fund suffered an increase in value of unfunded vested benefits from $25,331,310 to $99,361,186 in the year following the effective date of ERISA's minimum vesting requirements, due principally to a plan amendment reducing its 20-year vesting requirement to 10 years to comply with the mandate of ERISA. Affidavit of A. S. Hansen, Inc., at 24, Peick, et al. v. Pension Benefit Guaranty Corp., et al., No. 81-C-1911 (N.D. Ill.).

3. Union Activities. Union organizing efforts frequently result in the grant of past service credits for pension purposes, unfunded by prior employer contributions. As new entrants come into the plan with unfunded past service credits, the value of the fund's vested benefits increases. And, each time benefit levels are raised, unfunded vested benefits must necessarily increase, and in addition the effect of extension of unfunded past service credits on the fund's vested benefits is exacerbated.

4. Asset Fluctuations. Fluctuations occur in the value of the fund's assets and the rate of return on its investments resulting from economic factors totally outside the control of contributing employers or the trustees. For example, inflation, recession, stock market and interest rate fluctuations all obviously have a substantial effect on the value of unfunded vested benefits. The value of assets computed for funding purposes may vary by as much as 20% from market value.

5. Actuarial Methods. Since funding decisions and benefit level decisions are based on the estimates of projected benefit costs compared to asset values and income, actuaries use conservative interest rate assumptions in valuing benefits. If the

interest rate assumption is lower than the actual rate to be expected by the fund, the fund will overstate the "true" present value of vested benefits. See Comments by Russell J. Mueller, actuary and minority legislative associate, House Labor-Management Relations Subcommittee, reported in BNA Pension Reporter No. 362, A-17, A-18 (October 5, 1981).

b. Withdrawal Liability

Under the Multiemployer Pension Plan Amendments Act of 1980, the fund assesses liability against a withdrawing employer purely on the basis of the arithmetical relationship between the employer's past contribution level and the total contributions by all employers over the same period. There is no necessary relationship between the vested benefits attributable to that employer's former employees and the amount of liability. In the case of Keith Fulton & Sons, Inc., the contributions made by the company during the five plan years preceding the liquidation amounted to .00085 of the total contributions made by all employers who had not withdrawn during that period. Therefore, the liability charged against Keith Fulton was about .00085 of the total unfunded vested liability computed by the Fund, or $468,637. This would be the company's liability no matter how many employees had actually become vested, and even if all were now working for other contributing employers.

Thus, you can see that where (1) the "value of vested benefits" is an artificial concept dependent on arbitrary selection of actuarial assumptions, (2) the computed "value of assets" may vary as much as 20% in either direction from the actual value, and (3) there may in fact be no loss or cost to the fund on account of a withdrawal, then the withdrawal liability imposed by the statute, as applied by the funds, is clearly irrational and punitive.

2. Keith Fulton & Sons, Inc. v. New England Teamsters Pension Fund.

On March 11, 1982, you asked Mr. Fulton to explain the grounds on which he was challenging the pension fund's claim for liability. He explained that the litigation was based on the fund's improper calculation of liability as well as on the unconstitutionality of the law itself. We would like to expand on this general statement.

We are alleging in the lawsuit filed by Keith Fulton against the New England Teamsters Fund (C.A. No. 81-2378S, D. Mass.) a breach of contract claim and claims that the MPPAA is unconstitutional. You are already quite familiar with the allegations of unconstitutionality raised in Keith Fulton's case, which are similar to those raised in the other 85 cases now pending in courts across the nation. These focus on the procedural defects of the statute as well as the substantive violations of due process involved in the imposition of liability for benefits created by the plan trustees, impairing the plans' contractual promises to employers that they would be liable only for the payment of contributions.

One of the serious defects of the statute is that while it establishes employer liability in a superficially precise manner, allocating the "value" of benefits among employers in a strict mathematical ratio, the trustees and their actuaries have a great deal of flexibility in determining the "value" to be allocated, and there is no assurance that the "value" assessed truly reflects the vested liabilities of the plan. A brief summary of the contract claim raised in Kieth Fulton's lawsuit will illustrate the extraordinarily broad discretion granted to pension fund trustees under existing law, and the advantage taken by fund trustees of this discretion to maximize the employer's liability.

The breach of contract action filed by Kieth Fulton & Sons, Inc. is based on the provisions in the trust agreement to which Fulton was signatory which provide that the liability of any employer is limited to its obligation to make periodic contributions under its collective bargaining agreement. We assert that it is the contractual obligation of the trustees to interpret and apply the statute and contract so as to minimize the interference with the contract created by the statute, and to insofar as possible attempt to enforce the original intent of the parties. One party cannot, merely because an intervening statute invalidates some portion of its agreement, thereupon treat the underlying intent as no longer in effect in order to maximize its own return. Unfortunately, the vagueness of the statute has produced that very result.

For example, most plans permit trustees to cancel benefits based on service prior to the employer's entry into the plan, if the employer withdraws from the plan under certain specified circumstances. These pre-contribution benefits may be forfeited under Section 411(a)(3)(E), and thus are not "vested" benefits which are to be allocated to withdrawing employers. Even though not "vested", actuaries will include them in their calculations for funding purposes, in accordance with their generally conservative approach. Similarly, some plans, when computing benefit values for funding purposes, will overestimate the values by (a) not distinguishing between benefit service and vesting service, (b) using very conservative interest assumptions, and (c) maintaining census data in which as much as 20% of the active employees will have unknown age or service, and assuming certain service or age data which may be inaccurate. See Affidavit of Joseph Dempty, actuary, in Keith Fulton & Sons, Inc. v. Teamsters Fund, supra.

Despite these inaccuracies in the actuarial calculations for funding purposes, multiemployer plans are using the same calculations to determine withdrawal liability. The effect is to overstate each employer's withdrawal liability, and to overstate the liabilities of all multiemployer plans. While the discretion alloted by the MPPAA to plan trustees was broadly stated precisely so that trustees could tailor the requirements of the MPPAA to the individual provisions of each plan,* in most cases plan trustees have exercised their discretion in a way totally contrary to their contractual obligations. This may have been due to the inadequate data base and actuarial methods in common use, but the effect on employers is disastrous.

Initially, it is observed that at all times up to the passage of the MPPAA, the plan trustees have been willing to contract with employers for the provision of pension benefits to their employees based only on the employer's agreement to pay no more than its required contributions in accordance with the collective bargaining agreements. This is the essential bargain which should be preserved by Congress.

In considering amendments to ERISA regarding multiemployer plans, Congress should recognize that actuarial computations regarding the overall liabilities of multiemployer plans are imprecise and overstated. Therefore, it will always be inequitable to impose liability on employers based on estimated data, conservative assumptions, and benefits granted by trustees in excess of anticipated contributions. We believe that an equitable multiemployer plan law must restrict the ability of the trustees to increase benefits and thus reduce or eliminate the need for employer withdrawal liability.

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* "Multiemployer plans are creatures of collective bargaining. The committee believes that the integrity of the collective bargaining process must be preserved to the utmost extent consistent with assuring the financial soundness of multiemployer plans to meet benefit commitments. "House Report, [1980] 4 U.S. Code Cong. & Ad. News at 2931.

Such an approach is consistent with present fiduciary standards, since plan trustees should not increase benefit levels unless such increase is actuarially justified by projected employer contributions and will not damage the actuarial soundness of the fund. Thus, the present benefit levels must necessarily be supportable only by the expected employer contributions, without assuming any withdrawal liability payments at all.

While it is true that any collection of withdrawal liability will increase a plan's assets, the effect of that increase (which is necessarily in excess of actuarially projected contributions) is either to support future benefit increases for employees of the continuing employers or to reduce the future contribution burden of the continuing employers (the other side of the same coin).

To summarize our position, we strongly support S. 1748, which would restore the proper balance of risks and benefits in multiemployer plans to the unions, who are primarily responsible for the current problems of such plans. In the event a legislative compromise is necessary, however, any such solution to this problem must, at a minumum:

1. Provide rigid controls on the ability of plan trustees to adopt inadequate actuarial procedures which could be used to maximize employer liability;

2. Forbid the use of employer liability payments for future benefit increases or contribution reductions rather than amortization of accrued vested liabilities; and

3. Limit employer liabilities to those employers who deliberately seek to "dump" their employees' benefits on a plan by voluntarily withdrawing from the plan without fully funding such benefits.

Conclusion

On behalf of Keith Fulton, I want to thank you for your concern with the plight of the small employer in multiemployer plans, and affirm our support for your efforts to achieve equity in the law. If you desire any further clarifications of our position, please do not hesitate to contact me directly.

Very truly yours,

Susan Katz Hoffman

Senator NICKLES. Mr. Howell?

Mr. HOWELL. Senator, my name is David Howell, and I am chairman of the Willett, Inc., Corp., of Chicago. We are essentially a family-owned company, founded 114 years ago in 1868.

We have some 1,200 employees, and the company is primarily involved in transportation.

The board of directors of my company and I believe that the practical economic effect of ERISA and MEPPAA on our business assets and the assets of the industry we serve, is the greatest theft or confiscation of private property in U.S. history.

We further believe the ERISA-MEPPAA effect is antiunion, is detrimental to our union employees' economic viability, and ultimately will cost union membership dearly. But that is not our problem today.

We only recently found out that ERISA effectively forged our corporate signature to a pension promise we never made, but that in effect, the fund trustees made. Willett's wholly owned subsidiary, Willett Motor Coach, has primarily operated Willett's special education transportation contract with the Chicago Board of Education for some 54 years. It has also held a multiemployer contract with Teamster Local 744, covering its full-time, professionally trained drivers for over 50 years to date.

As do our other subsidiaries, it maintains a painstakingly and historically accurate detail costing of its operations in order to determine profitability for its shareholders, as well as determining bidding cost data to remain competitive with like-service providers.

There is no word to describe our feeling for having practiced dedicated cost, and comparable salary and wage controls with shareholder dividends at 40 percent of the public corporate levels for all these years, and then acquire millions of dollars in retroactive pension liabilities never negotiated by our management or our shareholders.

In 1980, the Chicago School Board, motivated by severe financial constraints, lessened the operating and financial responsibility standards, making it clear that they would accept nonunion drivers as part-time labor bids, recognizing that those bids were contained by labor, not having any pension requirements.

Willett Motor Coach, based on its union contract of $130 per day labor and fringe cost, bid $196.50 per bus-day against nonunion contractors with a $30 per day labor cost, who bid $170 per day, and they were awarded the 400-bus special education contract. Willett's nonunion competitors neglected to cover 31 routes, and Willett Motor Coach luckily received a 31-bus contract.

Except for this fortuitous competitor's error, Willett Motor Coach would have involuntarily totally withdrawn as a contributor to the local 744 pension fund.

The best available estimates—and there were no good estimates in 1980—said we might have owed $2.5 million, which is now estimated as $1.4 million as a withdrawal liability—all at a time when Willett Motor Coash lost its only contract, was unable to bid its singular contract anywhere else in the entire Midwest, and was forced to lay off 92 percent of its drivers, management and senior staff. We thoroughly understood that now we had $6 million in unemployed assets and shareholder and management quickly learned to their anguish a new definition for "a labyrinth of economic disaster," topped off by possible PGBC confiscation of vital survival resources, in a rapidly deteriorating economic climate.

Since by luck, and luck alone, we were awarded a board of education contract to employ 31 drivers, we acquired a "partially withdrawn" status, and now owe, if we cannot secure work for 135 drivers by 1983, $1.4 million to the PGBC. We cannot secure an addendum from local 744 for entry into other industries, and cannot economically bid Willett Motor Coach's services elsewhere. The market has destroyed Willett Motor Coach's economic position while ERISA-MEPPAA liability hangs over its head, like a guillotine, for a liability for which it never bargained, never signed, never agreed to, or ever contemplated in its financial reporting. Years of previous management audited reports lied to our shareholders, since profitable reports did not include the retroactive and, we believe, unconstitutional ERISA-MEPPAA liability. For appropriate reference, we think your committee should survey multiemployer shareholders as to how they feel about such reporting.

MEPPAA of 1980 raised our liability from 30 to 100 percent of corporate assets. For the Willett family of companies, MEPPAA has created a new potential liability of $6.2 million which, in 1981, is footnoted in our financial statement. Our unsecured lenders now have a "partner" in a liability never contemplated, and the effect on our business borrowing can only be reflected in higher costs and less availability.

While we have read of the great Financial Accounting Standards Board debate over how to reveal this unbelievable liability on the public corporate statements, we believe both they and the SEC continue to continence fraudulent financial statements, totally misleading purchasers of public multiemployer stocks. Would a multiemployer fund trustee be prudent in buying such stock today? Perhaps those authors of ERISA or individuals who knew of the change felt Congress would honor the ERISA contract and demand that the Pension Benefit Guaranty Corporation fulfill its promise to insure that newly created liability at a low and reasonable cost.

As you know, PBGC totally failed in its mandate, petitioned to Congress with "bait and switch" tactics to prevent multiemployers from insuring their fund liabilities, and Congress responded by placing a lien on our private property.

ERISA's redefinition of "defined contribution" contravened over 40,000 labor-management agreements to limit our liabilities to our pension contributions. We fail to understand how any author of such legislation could destroy the promise of both management and labor unilaterally. We failed to hear testimony in support of such legislation by anyone who had to pay that bill—by anyone.

Senator Nickles. That is a good point.

Could I interrupt again—and I would like to assure you again that your statement in its entirety will be entered into the record, but I would, I guess, like to stop you there, because I think it is a pretty strong point.

Mr. Howell, Senator, if I may, the witness for Bangor Punta Marine was unable to leave Boston this morning.

Senator NICKLES. I am aware of that, and we will enter his testimony into the record at this point, as if read, from James H. Hunt, who is president of Bangor Punta Marine.

[The prepared statements of Mr. Howell and Mr. Hunt follow:]

Testimony of David W. Howell
Chairman of The Willett Companies

Before the Subcommittee on Labor
of The Labor and Human Resources Committee
of The U.S. Senate
S.1748
March 11, 1982

Willett
Willett
Willett

THE WILLETT COMPANIES, 3901 SOUTH ASHLAND AVE., CHICAGO, ILLINOIS 60609 • TELEPHONE (312) 322-6300

PREPARED STATEMENT

March 1, 1982

Re: Impact of the Employee Retirement Income Security Act of 1974 and the Multiemployer Pension Plan Amendment Act of 1980 on Willett Motor Coach Co., a subsidiary of Willett, Inc.

To: The Honorable Orrin G. Hatch
United States Senator

ABOUT THE WITNESS

My name is David W. Howell and I reside at 900 North Lake Shore Drive, Chicago, Illinois. My business address is 3901 South Ashland Avenue, Chicago, Illinois 60609. I am chairman and chief executive officer of Willett, Inc., founded by A. T. Willett 114 years ago in 1868 and which is essentially a family-employee owned transportation corporation domiciled in Chicago, Illinois. It is principally involved in transportation, employs over 1,200 employees, and has always been a constructive civic contributor to the Chicagoland economy - we will stand comparison of our reputation with any comparable business.

The Board of Directors of Willett, Inc. and I consider the practical economic effect of ERISA and MEPPAA on our business assets, and assets of the industry we serve, to be the greatest theft or confiscation of private property in history. (We further believe the ERISA-MEPPAA effect is anti-union, is detrimental to our union employees economic viability, and ultimately will cost union membership dearly, but that is not our problem today).

Only recently have we found out that ERISA effectively forged our corporate signature to a pension promise we never made, but that in effect the fund trustees made. As ERISA's redefinition of our labor-management bargain came to light, in the midst of the most difficult economic struggle in our history, MEPPAA of 1980 came into being, increasing the potential exposure of members of multiemployer plans to only 100% of corporate assets. That liability risk includes pension fund stock market losses, unrealistic actuarial assumptions, and the legally required bias of trustees in favor of maximizing benefits to beneficiaries and therefore maximizing the cost to management.

IMPACT OF ERISA-MEPPAA ON WILLETT

Willett's wholly owned subsidiary, Willett Motor Coach, has primarily operated Willett's Special Education Transportation Contract with the Chicago Board of Education. The Contract was first awarded to Willett in 1923 and subsequently bid either annually or at least every three years through 1980. Willett Motor Coach has held a multiemployer contract with Teamster Local 744 covering its full-time, professionally trained drivers for over 50 years to date. Willett Motor

Coach Co., as have our other subsidiaries, maintains a painstakingly and historically accurate detail costing of its operations in order to determine profitability for its shareholders, as well as determining bidding cost data to remain competitive with like-service providers. There is no word to describe our feeling for having practiced dedicated cost, and comparable salary and wage controls with shareholder dividends at 40% of the public corporate levels for all these years, and then acquire millions of dollars in retroactive pension liabilities never negotiated by our management or shareholders.

In 1980 the Chicago School Board, motivated by severe financial constraints, lessened the operating and financial responsibility standards of its Special Education Contract and further made it clear that non-union part-time labor bids were acceptable. Willett Motor Coach, based on its union contract $130.00 per day labor and fringe cost, bid $196.50 per bus-day against non-union contractors with $30.00 per day labor costs who bid $170.00 per bus-day and thus were awarded the 400 bus basic Special Education Contract. Willett's non-union competitors neglected to cover the entire bid, so Willett Motor Coach luckily received a 31 bus contract. Except for this fortuitous competitor's error, Willett Motor Coach would have involuntarily totally "withdrawn" as a contributor to the Local 744 pension fund.

The best available estimates in 1980 indicated a possible $2.5 million liability (now estimated at $1.4 million) - all at a time when Willett Motor Coach had lost its only contract, was unable to bid its singular contract anywhere else in the entire Midwest, and was forced to terminate or layoff 92% of its drivers, management and senior staff, and thoroughly understood that it now had $6 million in unemployed assets. Shareholder and management certainly learned to their anguish a new definition for "a labyrinth of economic disaster," topped off by possible PGBC confiscation of vital survival resources, in a rapidly deteriorating economic climate.

Since, by "luck," Willett Motor Coach was awarded a Board of Education contract to employ 31 drivers, it acquired a status as "partially withdrawn" from the pension fund and will owe a currently estimated $1.4 million to the Local 744 fund if it cannot secure work for at least 135 drivers by 1983. It cannot secure an addendum from Local 744 for entry into other industries, and cannot economically bid its services elsewhere. The market has destroyed Willett Motor Coach's economic position while ERISA-MEPPAA liability hangs over its head, like a guillotine, for a liability for which it never bargained, never signed, never agreed to, or ever contemplated in its financial reporting. Further, years of previous management audited reports lied to our shareholders, since profitable reports did not include the retroactive and, we believe, unconstitutional ERISA-MEPPAA liability. For appropriate reference, your committee should survey multiemployer shareholders as to their concern about such reporting.

MEPPA of 1980 raised maximum liability from 30% to 100% of corporate assets. For the Willett family of companies, MEPPA has created a new potential liability of $6.2 million in the financial footnotes of our audited statements. Our unsecured lenders now have a "partner" in a liability never contemplated and the effect on our business borrowing can only be reflected in higher costs and less availability. While we have read of the great FASB debate over how to reveal this "unbelievable" liability on the public corporate statements, we believe both they and the SEC continue to continence fraudulent financial statements, totally misleading purchasers of public multiemployer stocks. Would a multiemployer fund trustee be prudent in buying such stock today?

How could this happen?

Our multiemployer industry was simply never warned or notified of its massive new liability by the U.S. Chamber of Commerce, the Illinois State Chamber of Commerce, the Chicago Association of Commerce and Industry, the Rotary Club, our auditors, our actuaries, our local transportion and business associations, nor the business press.

Perhaps those ERISA authors or individuals who knew of the change felt Congress would honor the ERISA contract and demand that the Pension Benefit Guaranty Corporation fulfill its promise to insure the newly created liability at a low and reasonable cost. As you know, PBGC totally failed in its mandate, petitioned to Congress with "bait and switch" tactics to prevent multiemployers from insuring their fund liabilities, and Congress responded by placing a lien on our private property.

ERISA's redefinition of "defined contribution" contravened over 40,000 labor-management agreements by redefining industry and corporate agreement with labor to limit teamster pension liabilities to our contributions. We fail to understand how any author of such legislation could destroy the promise of both labor and management unilaterally. We further state that of the list of association names that compromised in the MEPPAA agreement, we failed to hear testimony in support of the legislation by anyone who had to pay that new bill.

Willett, Inc., a reasonably sophisticated corporation with an active board of seasoned and experienced directors, is affiliated with at least twenty local professional and business associations, employs a full-time corporation counsel, is audited by a member of the big eight in accounting firms, and received advice for its corporate pension planning from a major actuarial service. In spite of the foregoing associations and the considerable reading that I and my staff continue to digest, no one ever advised us until 1979 that ERISA had redefined our teamster bargaining agreement, destroying the dedicated intent of our management bargain with labor, and created for our family of corporations a liability for which we never bargained, never agreed to, and never accrued and for which we have not yet received tax credit or refund. Such notice was only received by an inadvertent random piece of mail. Subsequent dedicated review of ERISA and MEPPAA have led us to the following conclusions.

Summarily, Congress with effective notice to none in the ERISA Act of 1974 said, "Never mind your agreement, multi-employers, you are now liable for benefits which union leadership promised its members in order to acquire such membership, even though you have had no control over those benefits, nor any control over the size of those liabilities."

Several members of Congress have shared our concern, but said "how can we now go back and vote against 7.5 million employees' pensions" or "Congress must fulfill the pension promise made to employees," or "someone must insure the plans." We agree - promises made should be kept (including our constitutional private property rights). We totally refute any confiscation of our property to pay for a promise we didn't make.

Our industry believes that Congress should exhibit the integrity to respect our original labor-management agreement by passing S.1748.

If Congress must destroy our economic freedom to choose our business endeavor by the confiscation of our private property, at least pay for it. Even socialist countries pay for their nationalization of private property without forging corporate signatures to dishonest contracts without negotiated agreements.

Do you respect private property or don't you? You will soon give us your answer. Please, remember the multiemployer pension promise - to contribute. Do not hold us liable for a promise we never made.

Respectfully submitted,

David W. Howell

STATEMENT BY JAMES H. HUNT, PRESIDENT OF BANGOR PUNTA MARINE, DIVISION OF BANGOR PUNTA CORPORATION, BEFORE THE SENATE LABOR SUB-COMMITTEE IN SUPPORT OF SENATE BILL 1748, ENTITLED, "THE MULTI-EMPLOYER PENSION PLAN STABILIZATION ACT OF 1981."

Thank you very much for giving me the opportunity to appear before your Committee to discuss the effects on our Company of the Multi-Employer Pension Plan Amendments Act of 1980 and to present my views on the legislation, Senate Bill 1748, proposed by Senator Hatch to correct the problem caused by that Law.

My name is James H. Hunt, and I am the President of Bangor Punta Marine, a division of the Bangor Punta Corporation. Our division manufactures Cal and O'Day sailboats and yachts and is headquartered in Fall River, Massachusetts. We also have a manufacturing plant in Tampa, Florida. My story involves the Fall River plant where we employ about 200 people making O'Day boats.

When Bangor Punta took over the O'Day Company in 1966, the O'Day plant employees were covered by a collective bargaining agreement with Teamsters Union, Local 526. Bangor Punta continued to honor that contract and negotiated several successive renewal agreements.

In November 1973, we agreed, for our plant employees, to contribute to the New England Teamsters and Trucking Industry Pension Fund, and we made regular contributions to the Fund until 1980. In total, we paid the Teamsters Pension Fund slightly more than $740,000. Our contributions were based on the number of hours each of our employees worked and on a certain number of cents per hour which was negotiated with the Teamsters Union in our labor agreement.

In late 1979, we began negotiating with the Teamsters for a new contract to replace the one which was to expire at the end of January, 1980. By the expiration date we had not come to terms with the Union, and we agreed to extend the current contract indefinitely, while we continued to negotiate. By August, 1980, we still had been unable to reach an agreement with the Teamsters. The extension agreement was terminated and the Union called a strike. A short time later, we resumed production using management and office people, some plant employees who crossed the Teamsters Union picket line and some newly hired employees. As time went by, we hired additional new people and our production almost returned to normal levels.

Of course, the Teamsters Union was not happy with the situation, but we consulted our attorneys who advised that we had a right under the federal labor laws to continue to operate the plant during the strike.

By the first part of 1981, we had hired a number of new employees to replace the strikers and a very substantial number of our employees who had been on strike, abandoned the picket lines and returned to work.

In March, 1981, a number of our employees contacted their own attorney who filed petition with the National Labor Relations Board for an election to be conducted by the Board in which all our plant employees could vote as to whether or not they wished to have the Teamsters Union continue to represent them in collective bargaining.

On April 24, 1981, the election was held at the plant where all employees, both those working and those on strike, had an opportunity to vote by secret ballot. The result of this vote was that the Teamsters Union was decertified, that is, the employees voted not to have the Teamsters as their bargaining agent. The NLRB certified the election results on May 5, 1981.

In May, 1981 we wrote to the Teamsters Pension Fund Trustees asking to discuss the possibility of an arrangement which would protect those of our employees who had participated in the Teamsters Pension Plan in their right to receive benefits from the Pension Fund. We offered to continue to make payments for these employees until their pension rights were vested. The Teamsters Pension Trustees refused to discuss this subject with us and, instead, informed us that we would be assessed liability for withdrawing from their Plan under the 1980 Multi-Employer Pension Law.

In September, 1981, the Pension Fund sent us a notice that we had been assessed $1,236,987.00 as a withdrawal liability owed to the Fund under the Multi-Employer Pension Plan Amendments Act of 1980. We were informed that the liability could be paid in 116 equal monthly installments of $15,291.00 starting October 15, 1981 with a final payment of $14,835.00.

At the same time, the Fund informed our employees that the amount of service credit which they had accumulated as a result of employment with O'Day prior to 1973 (when we started contributing to the Fund) would be taken away from them unless the matter of the withdrawal liability with our Company was resolved. That action by the Teamsters Fund means that some of our employees who would have had vested benefits in the Fund if that prior service credit was available to them, will lose those benefits and for all intents and purposes will get nothing from the Teamsters Fund unless we pay the withdrawal liability.

When we stopped contributing to the Teamsters Pension Fund, only three or four people who had been employed at our Fall River Plant were actually collecting pensions from the Fund. None of them was, or is, collecting a full pension. We estimate that the total payments by the Fund to these three or four people is less than $8,000 per year.

We believe that there are approximately 25 of our employees who are eligible to receive some amount of pension from the Teamsters Pension Fund when they reach 64 years of age, the normal retirement age. Of course, these employees will get pensions only if they are not deprived of service credit by the Trustees as I indicated before and only if we pay the withdrawal liability.

We estimate that the total cost to the Teamsters Pension Fund of paying pensions to these 25 of our employees will be somewhat less than $40,000 per year, if all these 25 people are paid their pensions at the same time. And since most of these employees have at least 25 years or so before they reach age 64, the Fund will have at least 25 years to invest the $740,000 we have already contributed and will have at least 15 years to invest the full $1,236,987.00 withdrawal liability which they have assessed under the 1980 Multi-Employer Pension Law.

Thus, we will have contributed a total of Two Million Dollars to the Teamsters Pension Fund, and the Fund will be required to pay pensions to our employees in a total amount which can never exceed $50,000 per year.

Assuming that the Fund invests that money at only 5% per year, the Fund Trustees could pay pensions to our employees without ever touching the Two Million Dollars.

My point is that the money we must pay the Teamsters Pension Fund under the Multi-Employer Pension Plan Act does not bear any realistic relationship to the pension funding needs of our Bangor Punta Marine employees, and it is obvious that the withdrawal liability assessed against us does nothing to provide pension protection for our employees' retirement. Clearly, our withdrawal from the Fund did not give rise to the need for pension funding at a million dollar level for our employees. The lack of security in this multi-employer pension plan is not caused by our withdrawal. Indeed it is probably not caused by the withdrawal of employers at all. The lack of pension security has been caused, in my judgment, by the Pension Trustees who have agreed to pay pensions at levels which are much too high - given the amount of expected contributions to the Pension Fund. This over-extending of the Pension Fund is not the responsibility of Bangor Punta Marine.

I think it is important to point out that under our agreements with the Teamsters Union, and with the Teamsters Pension Fund, our only obligation was to make contributions to the Fund based on the actual hours worked by our covered employees. This was the full extent of our agreement. By the same token we, the Company, had no rights with respect to the Fund. We had no right to decide what pension benefits the Fund would provide. We had nothing to say about the Fund's investment or management. We had no participation in the administration of pension benefits. We had no authority to hire the Fund's managers. All these matters were in the hands of the Teamsters Pension Trustees. We, and our employees, looked to, and relied on, the Trustees to handle all these matters. All our Company did, or could do, was to pay the money to the Fund each month. The Teamsters Pension Trustees agreed to assume all responsibility for the reasonable and prudent handling of the affairs of the Fund.

We did not promise our employees a pension. All we promised was to make monthly contributions. The Teamsters Pension Fund promised the pensions. We did all that we agreed to do. We paid all the money. Apparently the Pension Fund Trustees did not do all they agreed to do. They did not, in my view, manage the Fund properly. If they had, we would probably have no need for a Multi-Employer Pension Plan Amendments Act of 1980. We would have no need for withdrawal liability, and we would not be forced to pay almost one and a quarter million dollars to the Fund.

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y that I believe the Senator Hatch's Bill
. correct the problems which have been caused
:t. I support that Bill and request that your
ommend its enactment.

Senator NICKLES. Mr. Ryder, you mentioned at one time that the exemption in the legislation was actually not utilized or not nearly broad enough to cover many of the people. Do you think an exemption for the trucking industry is what you are looking for, or a more comprehensive approach?

Mr. RYDER. Well, we really feel that the bill as it presently stands is a more simple and direct approach. We have tried the exemption program in the past; as you know, the present trucking industry exemption frankly does not work for our industry, principally because of the phrase, "substantially all." This has been defined by PBGC to mean that 85 percent of the participants in a fund must be in the trucking industry, and that does not cover our major funds.

The constrution industry has an exemption which, if I understand, removed their opposition to the Amendments Act of 1980. We have looked at that. We do not know whether it can apply in our case; we are not sure. We feel it may offer some possibilities, and we are certainly willing to sit down and discuss its application to our industry.

Senator NICKLES. In the form of an exemption similar to what is in for construction?

Mr. RYDER. Right.

Senator NICKLES. Mr. Shurtleff, you mentioned several things. Basically, you highlighted the problem you are having where you are negotiating a merger. If I am correct, part of your statement said that you had to call that off, primarily because, or was it solely because of the liabilities that were being thrust upon you in regards to pension liabilities?

Mr. SHURTLEFF. Yes, sir. It was solely for that reason. There were no other reasons. We had agreed in every single respect, except that one item, which made it impossible to complete the transaction.

Senator NICKLES. You said they were both losing money, and you felt like if you combined, you could save your administrative expenses and by not competing against each other, to some extent, you would have been able to have a viable organization going today.

Mr. SHURTLEFF. Yes, sir.

Senator NICKLES. Are both companies going today?

Mr. SHURTLEFF. Yes, sir. Both companies are still operating today, and both companies have incurred rather substantial losses in 1981, and both companies are still encountering losses in 1982.

Senator NICKLES. Was the $30 million liability assessment strictly for your company, or both combined?

Mr. SHURTLEFF. The $30 million was the computed liability at that time for our company alone, and because the transaction was set up so that East Texas Motor Freight Lines would be buying the assets of Time, East Texas had to look at our $30 million liability; their own pension liability would have been greater than the $30 million. But because of the way the transaction was set up, whereby they would buy the assets of Time-D.C., then it was our $30 million liability that was the cause of the transaction not being consummated.

Senator **Nickles**. Part of the problem I am still having is, you have two trucking industries, and the employees in both industries are covered by the same plan?

Mr. **Shurtleff**. Yes, sir.

Senator **Nickles**. The liabilities of those employees are still, today, covered under the same plan?

Mr. **Shurtleff**. Yes, sir.

Senator **Nickles**. What difference would it make if it was under one company or two companies?

Mr. **Shurtleff**. Well, it is because the way the Amendments Act is written. If you combine the employees under an assets sale, and if the amount of contributions, which would be based on employment level, should drop off, then a partial liability is triggered.

Now, the deregulation of the trucking industry has also caused more attempts at market adjustment and consolidations which can lead to temporary job dislocation. So if you put two companies together, there will be some reduction of jobs and thus trigger partial withdrawal liability under the 1980 Amendments Act.

Senator **Nickles**. You would have a partial reduction in your work force, which would cause a partial termination, and trigger that liability to some extent.

Mr. **Shurtleff**. Yes, sir.

Senator **Nickles**. Not the full $30 million, but some portion thereof?

Mr. **Shurtleff**. Yes, sir; even though the cause of the reduction would have nothing to do with the Amendments Act, it is written so that regardless of the cause of the reduction, it could cause a partial withdrawal which would cause the owners not to consummate the transaction.

Senator **Nickles**. You mentioned that you are presently in court, in suit over it, and you are suing over the constitutionality of the Act, and what else?

Mr. **Shurtleff**. Yes, sir. We are party to a suit filed recently in Jackson, Mississippi, in which we are questioning whether the law is constitutional.

Senator **Nickles**. You did not consummate the transfer or the merger, and therefore, you did not consummate the imposition of the liability.

Mr. **Shurtleff**. That is right. We are just trying to determine where we are on the matter, so that someday, we might buy or sell or do something other than what we are doing.

Senator **Nickles**. I understand.

Mr. Fulton, your case is a little different. You actually have had your business shut down; you closed.

Mr. **Fulton**. Yes.

Senator **Nickles**. Did you sell your business?

Mr. **Fulton**. No. I had to liquidate.

Senator **Nickles**. You did liquidate for something like $1 million, and you had $400,000 of termination liability.

Mr. **Fulton**. Right.

Senator **Nickles**. I believe you also said that you were in court; is that correct?

Mr. **Fulton**. Yes.

Senator **Nickles**. You have paid that $400,000; is that correct?

Mr. FULTON. Correct.

Senator NICKLES. It is tied up in the courts. Are you suing on the constitutionality of the law, or are you suing to protect your $400,000? What legal method area you approaching?

Mr. FULTON. Constitutionality is one basis.

Senator NICKLES. You mentioned something that was interesting to me. How many employees did you have that were covered under the Teamsters' plan?

Mr. FULTON. I had 35 teamsters.

Senator NICKLES. Your liability was——

Mr. FULTON. $468,637.

Senator NICKLES. $468,000, and you had 35 teamsters. How many do you have who are currently retired and drawing pension benefits today—what is the total active and retired?

Mr. FULTON. From my company, in all the years that I have been with it, I would say there are probably 7 or 8.

Senator NICKLES. You estimate 7 or 8 that are now on retirement.

Mr. FULTON. Yes.

Senator NICKLES. Do you happen to know how much their retirement benefits are?

Mr. FULTON. I believe that they have full service, and it is somewhere in the area of $600 a month.

Senator NICKLES. So you have 7 or 8 who are making about $600 or $800 a month. And then, you have about 35 that are active. I am just wondering, that termination liability is $468,000, so that would come out to $13,000 per man or something like that. I do not know if you see where I am coming from. You made a statement that you felt like that $468,000 was a windfall. How much were you contributing each year for those 35 plus the 7 or 8 that retired?

Mr. FULTON. My pension contribution ran on an average of $40,000 per year.

Senator NICKLES. You were paying $40,000 per year into the fund?

Mr. FULTON. Roughly.

Senator NICKLES. Do you have an actuary? I was wondering if you were assaulting this from an actuarial standpoint in the viewpoint of your past contributions, and where you had fully funded your employees' retirement benefits, or not.

Mr. FULTON. We are arguing that the fund is overstating the assets and liabilities, and we have actuaries who are working on it.

Senator NICKLES. That is part of, possibly, your suit. You might work around saying for the benefit—I think there are arguments that, "Yes, we had nothing to do with that benefit, and it is totally separate." We will hear a lot of that today. But your statement was, too, to some extent that you felt like your participants were fully funded, or that your contributions were adequate to fund that, I do not want to put words in your mouth.

Mr. FULTON. I felt that my participation had been fulfilled by the fact that I signed the contract, to which I agreed. I had no reason to believe that I would have to be bearing the burden of a withdrawal liability such as this one after I am out of business.

Believe me, I was happy in business. I did not want to be out of business.

Senator NICKLES. But you were unsuccessful as far as being able to find another location.

Mr. FULTON. Yes.

Senator NICKLES. Mr. Howell, You mentioned your problems and talked about your contract with the school board to run a bus service?

Mr. HOWELL. Transportation for special education and handicapped pupils.

Senator NICKLES. This may not be real pertinent to the testimony today, but was your contract with the Teamsters.

Mr. HOWELL. It was a Teamster contract, 744 local.

Senator NICKLES. You had paid them in wages and benefits a total that would equal $130 per day?

Mr. HOWELL. That is correct, for a 9-hour day.

Senator NICKLES. For a 9-hour day. The nonunion were coming in and undercutting you, and they were able to do it for $30 per day?

Mr. HOWELL. Because they were part-time help and only paid approximately $6 per hour for 4, 4½ hours per day, their cost was $30 per day, since none of the nonunion contracts in Chicago of any substance have any pension contributions of any kind, other than health and welfare.

Senator NICKLES. They would only pay for 4 hours a day, and you would pay for 9?

Mr. HOWELL. We had a 9-hour-day contract.

Senator NICKLES. How much time did those buses run?

Mr. HOWELL. They ran approximately 5 hours a day, except on special charter or special demand by the board of education.

Senator NICKLES. Basically, your business is faced with a couple of things. You have some serious competition problems.

Mr. HOWELL. We became uneconomically viable in the market.

Senator NICKLES. That has more to do with the fact that the contracts were opened up.

Mr. HOWELL. That is a business risk. What was not a business risk was to require a liability that was never bargained for which impairs our borrowing ability and is like an ax over our head.

Senator NICKLES. Let us talk about that liability. You mentioned originally that you had a liability of $2.5 million, and now you say it is $1.4 million. Is that because you are able to keep these 35 employees?

Mr. HOWELL. No. It is because we finally began to get accurate numbers. The original estimates in 1980 were $13,000 per employee. Since a number of our employees were recently hired—that is, over the last 6 or 8 years—the actual liability wound up to be less than originally anticipated. You realize that actuaries from the pension funds give you information that sometimes is dated and as a result, withdrawal liabilty is a difficult number to get a handle on. When we heard the number originally, we thought we might owe $4 million. Nobody could give us a good number.

Senator NICKLES. Is this Central States?

Mr. HOWELL. No. This is the local 744 pension fund. It is its own pension fund. It is not part of any other.

Senator NICKLES. Dealing strictly with Chicago?

Mr. HOWELL. Yes.

Senator NICKLES. Do you have any idea how big the fund is?

Mr. **Howell**. No; I do not.

Senator **Nickles**. Do you think that $1.4 million is an accurate figure as far as your pro rata share?

Mr. **Howell**. I would guess that maybe it is plus or minus 10 percent accurate at this point.

Senator **Nickles**. Have you ever had anything to do with the benefits that the fund would pay or pay out?

Mr. **Howell**. All we ever negotiated was the contribution in terms of so many dollars a week, so many dollars an hour, or so many dollars a day.

Senator **Nickles**. Do you have anything to do with the benefit schedules today?

Mr. **Howell**. No.

Senator **Nickles**. Do you have anything to do with the investments today?

Mr. **Howell**. No.

Senator **Nickles**. How many people do you have in your company?

Mr. **Howell**. We had 485; we have 31 today.

Senator **Nickles**. Do you feel like you should have some input with the benefit procedures over the investments if you continue with some libility in that section?

Mr. **Howell**. I would say first, we did not bargain for the liability. If you are saying should we have some input in the future, based on what we know now, I would tell you that whoever would hope for that probably has never been in union negotiations. To the best of my knowledge, the Teamsters run the pension fund security, and the fact that there are management employees on it makes it a limited democracy, at best.

Senator **Nickles**. You have 30-some employees, and you had 400, and you lost this major contract. I am presuming you would be looking for other fields to harvest. Did they prohibit you from entering into other types of industries?

Mr. **Howell**. Local 744 is a part of the joint council 25, representing all the Teamsters in that area, and their jurisdiction only covers beverage drivers, which is a declining industry, our contract, and one other, much lower cost schoolbus driver contract. When we asked them for an addendum to use those drivers perhaps in other transportation industries, we had deafening silence.

Senator **Nickles**. They would not allow your workers to go into other fields.

Mr. **Howell**. Not into trucking, not into other types of busing, nor other types of work except for what we are doing.

Senator **Nickles**. Right now, you have 30-some employees?

Mr. **Howell**. Thirty-one drivers.

Senator **Nickles**. You have 31 drivers. And you had to lay off how many ?

Mr. **Howell**. 450.

Senator **Nickles**. You had to lay off 450. But that local would not allow you to go in and, say, try to get into delivery of any other types of items?

Mr. **Howell**. No, sir. I think they are probably prohibited to some degree by their charter. They would have had to have an addendum for their charter through the joint council to enter into other jurisdictions. That may be their problem. All I can tell you is that they failed to respond to our inquiries on several occasions.

Senator NICKLES. Here again, I am branching away, but what happened to your 450 workers that were laid off?

Mr. HOWELL. Some found employment elsewhere. Some have their benefits running out and are looking for employment. But they are not driving schoolbuses in Chicago, period.

Senator NICKLES. What would keep them from, running over to the nonunion group that just got the contract and running the same route, but with a different hat or a different company?

Mr. Howell. They could, except they found it very difficult to go from $130 per day to $30 per day in terms of wages. In many cases, they found jobs, I am sure, driving for other companies, but we cannot employ them. They could not even go to work for our trucking company.

Senator NICKLES. You have a separate trucking company?

Mr. HOWELL. We have a different trucking company, but due to the throes of recession and deregulation, it has approximately laid off up to the 14th year of seniority. There is a serious recession in the Middle West.

Senator NICKLES. I am aware of that, but I am also concerned about the restrictions that evidently have been placed upon you in management and also your flexibility, as far as being able to try and help your people find jobs.

Mr. HOWELL. We told the union that we would employ assets to the best of our ability to put those people to work in any other industry if they would give us an addendum. We received a deafening silence.

Senator NICKLES. Senator Hatch, did you have some questions?

Senator HATCH. Mr. Howell, I think you and Mr. Shurtleff have both indicated—and maybe I am misconstruing it—that the reduction in your business has the potential to trigger this liability.

Mr. HOWELL. Yes. If we do not have 135 to 140 employees in Willett Motor Coach by the middle part of 1983, our lawyers have advised us that in 1984, we should start sending $800,000 the first year and $600,000 the second year——

Senator HATCH. Indefinitely?

Mr. HOWELL. Well, until our liability is paid off. That is currently estimated at $1.4 million.

Senator HATCH. What you seem to be saying is that even though business is bad, and even though you have had a difficult time competing in some areas, and a reduction in forces has occurred, that this triggers liability that could just put you completely out of business.

Mr. HOWELL. That is correct. It is a very dangerous situation. We face a very difficult economic climate. We face a liability we did not anticipate. We face impaired credit. And instead of spending all of our time trying to obtain additional business, we are spending—at least, I am spending—25 percent of my time trying to find out what happened with ERISA-MEPPAA and the forthcoming REASA.

Senator HATCH. Mr. Shurtleff, I take it you have the same problem?

Mr. SHURTLEFF. Yes, Senator. Our point was just slightly different, in that if two companies are combined, and you actually have some drop in employment, together with the drop in employment as a result of the deregulation, then the partial withdrawal would take effect even though for reasons other than the merger.

Senator HATCH. What other subsequent events to any event that triggers—to a merger or a recession or whatever—what subsequent events will trigger withdrawal liability?

Mr. RYDER. Just about any cessation of business, Senator.

Senator HATCH. Any cessation of business.

Mr. RYDER. Yes. For instance, we all have terminals, some of which participate in a single pension fund. Since withdrawal liability is triggered by the relationship of employees to a specific pension fund—there are some 32 or 33 major Teamster pension funds in the country—closing a single terminal can trigger withdrawal liability.

Senator HATCH. You could cancel a terminal or have to shut it down because you lose contracts for whatever reason; it may be beyond your control, but that triggers withdrawal liability?

Mr. RYDER. That is right.

Senator HATCH. Are there any other events that would trigger withdrawal liability? You have indicated mergers, the sale of the business.

Mr. RYDER. Another combination would be decertification.

Senator HATCH. In and of itself?

Mr. RYDER. That is right.

Senator HATCH. In other words, if the employees themselves decide to decertify the union, which is their right under the labor laws of this country, then that would trigger withdrawal liability to those employees?

Mr. RYDER. If all the employees decertified, that would be withdrawal liability.

Senator HATCH. Well, who would get the money?

Mr. RYDER. The pension fund.

Senator HATCH. And what about the employees, do they ever get any of that money?

Mr. RYDER. No. They would receive whatever benefits——

Senator HATCH. That Teamsters Pension Fund decides to come up with?

Mr. RYDER. Well, I am not clear, but I think some vested benefits.

Senator HATCH. Thank you. I have to say, for the benefit of everybody here, the unions, of course, are fully aware of this problem and aware of this legislation. In fact, the Teamsters have found that the 1980 act tends to discourage unionizing efforts; isn't that true?

Mr. RYDER. That is correct.

Senator HATCH. If you were going into the trucking business today, would you become a union trucking business under these terms, if this is the way the law has to stay?

Mr. RYDER. Senator, we have set up new terminals in the last year, where we are party to Teamster contracts, and we have stayed away from the pension aspect of the contracts. We are using our own, single-employer fund in the company to cover the pension of those employees. We have refused to participate in new operations with the Teamster fund.

Senator Hatch. So this really is a discouragement to union organizing, and is certainly a discouragement to establishing pension funds for union workers?

Mr. Ryder. That is correct.

Senator Hatch. So in the end, even though it can ruin a lot of your businesses, it can ruin the trucking industry as well, and perhaps deter unionization in the trucking industry.

Mr. Ryder. Yes. Further, the plans themselves could be severely hurt if we do not have new entrants coming into the fund, and the only way to get new entrants is to induce new employers who are setting up, who become organized, to contribute to the pension fund. Because of the immense liabilities that an employer will face, they certainly will severely resist any attempt, like we are resisting, to join or make payments into the pension fund, the Multiemployer Fund.

Senator Hatch. Have you been discussing this problem with the Teamsters?

Mr. Ryder. Yes; we have, in our own company.

Senator Hatch. What is their thinking on the matter?

Mr. Ryder. Well, they have not offered resistance where we have set up operations, again through contract. We have not joined the Teamster Pension Fund in that particular area. We have covered those employees with our own corporate pension fund, so that they are covered with pensions, but not through a multiemployer plan.

Senator Hatch. The Teamsters will testify before we are through on this, but do you have any feelings whether or not they can support this bill?

Mr. Ryder. We have been led to believe through conversation that they are supporting the bill.

Senator Hatch. I do not think so. Did they offer any alternatives to this situation?

Mr. Ryder. At this point, we have not seen any concrete alternatives.

Senator Hatch. That is all I have, Mr. Chairman.

Senator Nickles. Senator Quayle, let me follow up with a couple of questions. Did you have any specific questions you wanted to ask this panel before you make your opening remarks?

Senator Quayle. I have an opening statement and some questions.

Senator Nickles. This is the American Trucking Associations panel.

Senator Quayle. Yes.

Senator Nickles. Let me ask just a couple of questions, and then I will turn it over for your comments.

Mr. Ryder, we are going to have the Teamsters testify next week, but we would be interested, do you have information or does the association have information—I think there are something like 40 different Teamster plans—do you have any information on those plans, the assets, the vested liabilities, the present value of the vested liabilities?

Mr. Ryder. We have very limited information. That type of information seems to be very difficult to obtain. We have reviewed the form 5,500's which are on file in the Labor Department to obtain information that is, I believe, 3 or 4 years old.

Senator NICKLES. That is the most current information that you do have?

Mr. RYDER. We can try to tabulate that information and supply it to the committee, if you wish.

Senator NICKLES. I would be interested in the most recent information you do have pertaining to that, and I would also be interested in looking at some of the contracts, though I know they vary from employer to employer, but I would be interested in taking a look at some of those, and we will ask the Teamsters for some of the same information, to give us a little bit better background of some of the problems that may or may not be in the industry.

Mr. RYDER. With respect to the contracts, are you talking specifically to the portion that pertains to pension payments?

Senator NICKLES. Specifically related to that. I am talking about how much money is going in; I am talking about statements like Mr. Fulton said he was paying something like $40,000 per year, and he has 35 employees that are current and 6 or 8 that are retired. I am not going to make major actuarial studies on these, but we would like to have some idea with these liabilities and assessments that have been thrown out, how relevant they really are, how close to being on target they are, and I think we can do that. I have done some of that type of work in the past. I would appreciate it.

Senator NICKLES. Senator Quayle, we welcome you to this morning's hearing and very much appreciate your input and interest.

Senator QUAYLE. Thank you very much, Mr. Chairman.

I certainly want to thank you for holding these hearings on this very important piece of legislation. I, with Senator Hatch, introduced S. 1748, and that particular piece of legislation deals with amending ERISA as it was changed on September 26, 1980. I believe that is the "D Day"—"D Day" meaning "Debt Day," or whatever other bad connotations you would like to apply to that unfortunate reform, quote-unquote, of ERISA—that has made it very difficult for multiemployer plans to continue.

I believe specifically, we are talking about the withdrawal liability on a negotiated contribution basis. That is about as simple and direct as I can put it. That is precisely what this legislation is going to do.

The chairman of this Subcommittee has long been an ardent supporter of the private sector and also trying to keep as much government interference out of that situation as possible, and I certainly support him in what he has done. He has shown that the principles are in line with his actions by having this hearing.

I do have a couple of questions.

Senator NICKLES. I might let the Senator know that they are having a quorum call now, and that it will soon become a live quorum, and they are expecting some floor activity in the not-too-distant future.

Senator QUAYLE. OK. I just have a couple of questions I would like to get to.

Senator NICKLES. I just wanted to let you know so you could be aware of that.

Senator QUAYLE. All right.

Could you give us some examples of what is going to happen to your industry; any prognostication of the future if, this bill is not passed and ERISA is back where it was before?

Have you directed yourselves to that point? Give us some vivid examples. If this thing is not changed, what are we talking about? Are the companies not going to join these pension plans? Are we talking ultimately that the employee as well as the employer, but more importantly, the employees, have a certain risk of not getting the benefits in the future because there is going to be a reluctance of employers to join pension plans?

Can you outline where we are and what the future really hold if, the Congress does not go along and do anything?

Mr. RYDER. Yes, Senator. We have stated that we believe that the multiemployer plans themselves will be very seriously injured, if not be forced to liquidate, in the future if they do not obtain new entrants into their plan.

Historically, the multiemployer plans have been a very financially sound operation. They have been fed by new employers, new businesses, as they develop, and bring in new employees. It is the constant turnover of the money within the fund, as a result of these new entrants, that creates their viability.

We have had instances here on the panel this morning of companies themselves who have suffered substantial damage from withdrawal liability, and employees will receive none of those benefits.

Senator QUAYLE. What is the effect in the outyears on the employees? Give us a worst-case scenario of what, in fact, could happen.

Are employees not going to be covered by pension plans? Is that a possibility?

Mr. RYDER. Well, the ability of an employee to receive his pension benefits in the multiemployer plans rests upon the multiemployer plans themselves. If they are unable to continue, if they are unable to financially provide for themselves, then of course, the benefits will not be there.

Senator QUAYLE. Do you think they will be unable to continue unless this reform is adopted?

Mr. RYDER. We believe that the progress that has developed since the enactment of the act, and evidence will show—we do not have it with us here today—that there has been a deterioration in the number of new entrants in multiemployer plans. If that would continue, our actuaries tell us that those plans will not be viable.

Senator QUAYLE. Do you have any numbers on that?

Mr. RYDER. No; I do not have them with me presently.

Senator QUAYLE. Are you going to get the numbers on that?

Mr. RYDER. We can supply that information to you.

Senator QUAYLE. I think it is very important to have some precise figures and data that we can ask others, particularly those who are going to oppose this legislation, if in fact you can show on an aggregate basis that there are thousands or hundreds of thousands of future beneficiaries who simply are not going to be covered under multiemployer pension plans because of the inequity that was established in 1980. But we need that data, so I would just impress upon you as a cosponsor of this legislation, let us get it as soon as possible.

Senator **Quayle**. I believe I heard Senator Hatch ask this question, but I want to ask it again. Are the Teamsters opposing this legislation?

Mr. **Ryder**. No, they are not.

Senator **Quayle**. Are they supporting the legislation?

Mr. **Ryder**. As far as we know, they are supporting the legislation.

Senator **Quayle**. So in other words, they will be forthcoming and be in support of this legislation, as far as you know?

Mr. **Ryder**. As far as we know, yes.

Senator **Quayle**. Yes?

Mr. **Howell**. I would like to volunteer that Mr. Lewis Pike, who is head of 705, was one of the early filers of a suit against PBGC, the Secretary of the Treasury, and Secretary of Labor, charging that the contract that he had with management had been breached. I personally heard him say that no one was going to break his word, that the defined contribution limit of liability was a major point of issue, that he respected that bargaining point, and would go to court to see it enforced if possible, and he is in court at this time, to see that the defined limit of contribution is maintained.

Senator **Quayle**. So we do have an agrement between management and labor, at least in the trucking industry, on this particular piece of legislation and what we are trying to do as far as the defined contribution and the withdrawal liability?

Mr. **Howell**. I believe that to be true, sir.

Senator **Quayle**. You believe that to be true.

Well, I would like to say, Mr. Chairman, that that is certainly progress, and I am glad to learn that there is some coming together, in this particular case, of employer, management and union. I would like to see it in other industries.

I certainly thank our distinguished panel here, and thank you, Mr. Chairman, for getting into this issue. It is long overdue. And I hope that those who come to testify in opposition to it will, in fact, have—at least in my opinion—have the burden to overcome on what is going to happen to those employees out there in the future that you indicate simply are not going to be covered if this legislation does not take effect.

Thank you very much.

Senator **Nickles**. Thank you, Senator Quayle.

Members of the panel, we appreciate your assistance and cooperation with the subcommittee today.

We are in a situation where the Senate is preparing to muster a quorum. We will continue, but I must sincerely say that we are going to have to go quick.

Our next panel includes Dennis Hansen, from the Ramsey Winch Co., in Tulsa, Okla.; and Edward S. Riss, President of Republic Industries, Inc., in Kansas City, Mo.

Mr. Hansen, we welcome you, and appreciate your comments. I have read both of your statements, incidentally, so we will have those entered into the record, and you might just give a quick oral summary of how this applies to your company.

STATEMENT OF DENNIS L. HANSEN, SECRETARY AND TREASURER, RAMSEY WINCH CO., TULSA, OKLA., AND EDWARD S. RISS, PRESIDENT, REPUBLIC INDUSTRIES, INC., KANSAS CITY, MO., A PANEL

Mr. **Hansen**. Thank you very much, Mr. Chairman.

A brief summary of the problems that we in Ramsey Winch have come across. Ramsey Winch is a manufacturing company with sales in the $16 to $20 million range. We employ about 215 employees, 136 of which are union employees.

We started negotiations in the 1978 bargaining unit negotiations, and Mr. Joe Henry, Executive Vice President of Ramsey Winch discussed with our International Association of Machinists business representative the possibility of bringing Ramsey bargaining unit employees under the Ramsey Winch retirement plan. He stated that if we could come up with a plan that was better than the IAM's, he would put it to a vote of the bargaining unit employees.

In the early part of 1980, we had determined, through an analysis, that some of our employees' pay scale and benefits were below average in some areas. As there was a shortage of skilled labor in the Tulsa area, management felt that in order to entice new employees and provide better benefits, that a new contract should be negotiated.

The offer was made and accepted by the bargaining unit employees on April 28th of 1980 and signed May 5th of 1980. Included in this offer was changing of pension plans, increased pay rates, a dental plan, and increased vacation benefits.

On May 5th, 1980, in good faith, we officially transferred our bargaining unit employees under the Ramsey Winch Co. plan. On September 26th, 1980, the Multiemployer Pension Plan Amendments Act of 1980 was signed into law, retroactively effective April 29th, 1980. This retroactivity, plus the actual content of the law, placed an undue hardship on the Ramsey Winch Co. We offered a retirement fund far superior to the IAM's plan. Retirement benefits are significantly larger under the Ramsey Winch plan, a range of $30 per month additional benefit for short-service employees and up to $150 per month for long-service employees. There are larger early retirement benefits——

Senator **Nickles**. Is this more than the IAM plan?

Mr. **Hansen**. More than the IAM plan, that is correct.

Senator **Nickles**. From $30 to what?

Mr. **Hansen**. To $150 per month.

Senator **Nickles**. Per month more benefits, OK.

Mr. **Hansen**. There are larger early retirement benefits a more liberal vesting schedule, and better death benefits. During the coverage under the IAM plan, six employees retired. This was possible because the IAM plan gave past service benefit credit for employees with service prior to 1975. However, remaining employees had no vested benefits under the IAM plan, because there is an eligibility requirement of 10 years, and the plan was in effect for only 8 years. As explained by the IAM business representative, all employees eligible for retirement at the time the IAM plan was terminated had 60 days to retire, or all past service benefits were forfeited, and they lost all vested benefits under the IAM plan, unless they transferred to another company-covered plan within 8 years.

The alleged withdrawal liability is $155,128. Using the actuarial assumption used by the IAM fund, the amount needed to fund these six employees' retirement benefits as of May 1, 1980, would be $50,776. Even though we had contributed over $148,000 more than the amount needed to fund these benefits, the IAM determined that we would owe an additional $155,000.

If our employees no longer have any vested rights, how could any portion of the unfunded liability be ours? As you can clearly see, we at Ramsey Winch are being unduly penalized. We started in 1978 to lay the groundwork for offering our employees better pension benefits. In May 1980, in good faith, we transferred the pension plan under the Ramsey Winch plan, and were penalized for giving our employees better benefits by a law passed some 5 months later.

Senator NICKLES. Thank you.

[The prepared statement of Mr. Hansen follows:]

TESTIMONY

OF

DENNIS L. HANSEN
SECRETARY AND TREASURER
RAMSEY WINCH COMPANY

ON

MULTIEMPLOYER PENSION PLAN STABILIZATION ACT

BEFORE THE

SENATE LABOR AND HUMAN RESOURCES

SUBCOMMITTEE ON LABOR

MARCH 11, 1982
ROOM 4232
DIRKSEN SENATE OFFICE BUILDING

Mr. Chairman and Members of the Subcommittee, my name is Dennis Hansen. I am the Secretary and Treasurer of the Ramsey Winch Company of Tulsa, Oklahoma.

I am most pleased to appear before this Senate Labor Subcommittee and to discuss the inequities the Multiemployer Pension Plan Amendment Acts of 1980 has placed upon Ramsey Winch Company.

Ramsey Winch Company began contributing to the IAM National Pension Fund effective February 22, 1973, in accordance with its collective bargaining agreement of that date with Local Lodge No. 790 of the International Association of Machinists and Aerospace Workers. That agreement required Ramsey Winch to contribute $.10 for each hour worked by an employee in the bargaining unit. Contribution rates were increased to $.15 per hour in June 1978.

In the 1978 contract negotiations, Mr. Joe Henry, Executive Vice President, discussed with Mr. L. Uhl, the IAM Business Representative, the possibility of bringing the Ramsey Union Employees under the Ramsey Winch Retirement Plan. Mr. Uhl agreed that if we would come up with a pension plan better than the IAM's plan he would agree to put it to a vote by the Bargaining Unit Employees. Mr. Ray Hatton, Personnel Manager, was given the project of analyzing the two plans and comming up with a proposal. (Mr. Hatton was employed in October, 1978, five months after the Collective Bargaining Agreement was signed, and was given this project as one of his first assignments.)

The anticipated change from the IAM Retirement Plan to Ramsey's, logically would have occurred at the beginning of the next Collective Bargaining Agreement, in 1981, since the current agreement contained language to the effect that Ramsey Winch would make contributions to the IAM Plan for the term of the agreement.

We at Ramsey Winch Company are constantly striving to improve the benefits offered to our employees. In the early part of 1980, an analysis of our union work force pay scale and benefits found them to be below average in some areas. As there was a shortage of skilled labor in the Tulsa Area, Management felt that in order to entice new employees and to provide better benefits to our employees a new contract should be negotiated. We had also determined that we could offer better pension benefits for the same cost. The offer was made to and accepted by the Bargaining Unit April 28, 1980, and signed May 5, 1980. This contract was for a 3 year period beginning May 5, 1980. Included in this offer was changing of pension plans, increased pay rates, a dental plan, and increased vacation benefits.

On May 4, 1980, in good faith we officially transferred our bargaining unit employees under the Ramsey Winch Company Plan. On September 26, 1980, President Carter signed the Multiemployer Pension Plan Amendment Acts of 1980 and made it retroactive to April 29, 1980.

This retroactivity plus the actual content of the law place an undue hardship on Ramsey Winch Company. I offer the following as support of my claim.

1. The Ramsey Winch Company Plan is far superior to the I.A.M. Plan in benefits. Retirement Benefits are significantly larger under the Ramsey Winch Plan. A range of $30 per month additional benefit for short service employees and up to $150 per month for long service employees. There are larger early retirement benefits, a more liberal vesting schedule and better death benefits.

2. During coverage under the I.A.M. Pension Plan we had six employees retire. They were able to retire because the union gave past service benefits to employees with service prior to 1975. Our remaining employees had no vested benefits under the I.A.M. plan as there is a eligibility requirement of 10 years and the plan was in effect for only 8 years. As explained by Mr. L. Uhl, the local union representative, all employees eligible for retirement had 60 days to retire or all past service benefit was forfeited and they lost all vested benefits under the I.A.M. plan unless they transfer to another company covered under the plan within 8 years.

3. The alledged withdrawal liability is $155,128.00. Our total contribution for the period of coverage (1973-1980) was $198,851.50. Using the actuarial assumption used by the I.A.M. Fund the amount needed to fund these six employees retirement benefits as of May 1, 1980, would be $50,776.00. Even though we had contributed over $148,000.00 more than the amount needed to fund these benefits the I.A.M. determined that we owe an additional $155,128.00 to cover unfunded liability. If our current employees no longer have any vested rights how can any portion of the unfunded liability be ours.

4. We at Ramsey Winch, through excellent management of the company have been able to hold our own during the current economic slump. The payment of this withdrawal liability would cause cutbacks in the areas of:

    A. Employment
    B. Purchase of Capital Equipment
    C. Improvement of Product Lines
    D. Expansion of Product Lines
    E. Expansion of Facilities

At the time Ramsey withdrew from the I.A.M. Pension Plan, we had no actual knowledge that the MPPAA, including the withdrawal liability provisions, was pending in Congress. The I.A.M. Pension Plan did not notify Ramsey Winch, in connection with the company's withdrawal, of the pendency of such legislation.

Ramsey Winch received no communication from the I.A.M. Pension Plan concerning either the MPPAA or its own withdrawal until May, 1981, eight months after the enactment of the Act. The series of letters that the I.A.M. Plan sent Ramsey Winch on that date demonstrates that the I.A.M. Plan had been considering the issue of withdrawal liability for some time. In a "Notice" to all contributing employers dated May 22, 1981, the I.A.M. Plan first informed Ramsey Winch that the MPPAA, with its withdrawal liability provisions, had been passed. In another letter of that date, which referred to the May 22, 1981 Notice as if it had been distributed long before, the Plan informed Ramsey Winch that, as of May 5, 1980, Ramsey Winch had "withdrawn" from the Plan within the meaning of the MPPAA. The letter stated that Ramsey Winch would be notified of the amount of its withdrawal liability, calculated under the "presumptive" method, as soon as the amount of that liability was determined. In yet another letter of May 22, 1981, which also referred to the May 22, 1981 Notice as if it had been issued long before, the Plan informed Ramsey Winch that its withdrawal liability had been calculated. An attached worksheet stated that Ramsey Winch's total withdrawal liability was $155,128 payable in 18 quarterly installments of $9,322, plus a final payment of $4,298.

By letter dated June 24, 1981, Ramsey Winch requested that the Plan provide it with information concerning the Plan's withdrawal liability assessment. Specifically, Ramsey Winch requested the actuarial valuation of the Plan's unfunded vested benefits, the total contributions made by Ramsey Winch and by all employees for the five years before Ramsey Winch's withdrawal, a list of any vested Ramsey Winch employees and the amount of their benefits, and a copy of the Plan's plan description. Ramsey Winch also sought to ascertain how it could be subjected to withdrawal liabilities, especially in such a large amount, when only six employees had achieved vested status. Ramsey Winch therefore requested an assessment of how much its withdrawal liability would have been under the MPPAA's optional "attributable" method of calculating withdrawal liability, which allocates the liability on the basis of the unfunded benefits attributable to an employer's own employees.

In its July 1, 1981, response to Ramsey Winch's request for information, the Plan provided only the actuarial statement and a copy of its Summary Plan Description. The Plan declined to provide the other information requested on the ground that Ramsey Winch's contributions were available from its own records and that information regarding vested benefits must be requested by individual employees. The Plan also evaded Ramsey Winch's attempt to ascertain how much of the assessed liability was attributable to its own employees' vested benefits, and merely stated that it required a fee of $225.00 to perform a calculation of potential withdrawal liability.

As you can clearly see, we at Ramsey Winch are being unduly penalized. We started in 1978 to lay the ground work for offering our employees better pension benefits. In May of 1980 in good faith we transferred the pension plan under the Ramsey Winch Plan and were penalized for giving our employees better benefits by a law passed some five months later.

Senator NICKLES. Mr. Riss?

Mr. RISS. Thank you, Senator. I would like to take this opportunity to thank you and the committee for allowing me to testify this morning.

Republic Industries, Inc., is a privately owned holding company, based in Kansas City, Mo.

On May 4, 1978, Republic entered into contracts to purchase Johnson Motor Lines. Johnson was a contributor to approximately 13 multiemployer pension plans. As part of the precontract evaluation and analysis of that purchase, Republic reviewed, among other things, of course, the audited financial statements of Johnson for a number of years, the latest being that of December 31, 1977. The same, very well-respected "Big 8" accounting firm that audited Johnson also audited the Central States Pension Fund. In those audited statements in any of those years, including that ended December 31, 1977, there was no mention whatsoever, either on Johnson's balance sheet or in footnote form, of any withdrawal liability, current or potential, of any kind. In addition to that, Republic reviewed the labor contracts, trust agreements, and participation agreements associated with each of the plans and each of the contracts on a national and local level. Those agreements and contracts specifically limited Johnson and other motor carriers' liability to those plans to the specific per man-hour and man-week contractual amounts specified in those documents.

After the acquisition, Johnson experienced a number of operating difficulties, which are detailed fairly extensively not only in written testimony, but also in our various lawsuits.

On July 30, 1980, after exhausting a number of alternatives, Johnson determined that it had no choice, like many other carriers in similar situations, but to close its doors. From that point, the orderly liquidation of Johnson proceeded, involving primarily an auction of parts and equipment and the sale of real estate. The proceeds of those activities were utilized to fully satisfy all of Johnson's known obligations and liabilities in a fair, orderly, and timely fashion.

As you know, Congress sent the Multiemployer Pension Plan Amendment Act of 1980 to President Carter on September 19, 1980, and it was signed by the President on September 26, nearly 2 months after Johnson elected to cease operation. Its provisions for withdrawal liability, applied after the fact, have resulted in claims totaling in the aggregate nearly $20 million being filed against

Johnson by the various pension plans to which Johnson was a contributing employer.

At no time, before or after July 30, 1980, until October of that year, when we received correspondence from Central States, indicating their intent to possibly at some future date file a claim under the act, did any officer or director of Republic, nor to the best of my knowledge any officer or director of Johnson, have any knowledge of any withdrawal liability of any kind associated with Johnson Motor Lines. Obviously, if we had, any of the alternatives that were turned down on July 30 and before, and exhausted for several months prior to that would have been far preferable to the situation that we are in at this time.

As a result of its 14-month ownership of Johnson Motor Lines, Republic Industries is now saddled, as I mentioned previously, with nearly $20 million of withdrawal liability claims. This not only exceeds the purchase price paid for Johnson; it exceeds Johnson's net worth; it exceeds the cumulative net earnings of Johnson for all the years of operation since its inception in 1945, and in fact, it indeed exceeds the net worth of Republic Industries itself. If that were not severe enough, the act also provides for onerous installment payment provisions of this aggregate liability.

In our particular situation, that would mean an annual aggregate payment to these plans of nearly $4 million for a period in excess of 6 years. Failure to make any of those installment payments results in the immediate and full acceleration of the entire amount due.

To protect ourselves against this onslaught, we are currently involved in litigation in four separate Federal district courts, in which we challenge the constitutionality of the statute, particularly as it is retroactively applied to Johnson Motor Lines. Ours was the first of now over close to 70 lawsuits—that is expected to reach 100 within the next 30 days—that have been filed and raise similar issues of constitutionality.

Our legal and actuarial fees already exceed a quarter of a million dollars, and are unfortunately expected to go much higher as a result of this wave of litigation.

We very respectfully request that legislation be enacted immediately which will eliminate the retroactive imposition of the withdrawal liability provisions of this act.

Thank you.

Senator NICKLES. Thank you, Mr. Riss. We appreciate your comments.

[The prepared statement and summary fact sheet of Mr. Riss follows:]

TESTIMONY OF EDWARD S. RISS

PRESIDENT, REPUBLIC INDUSTRIES, INC.

S. 1748

BEFORE THE SUBCOMMITTEE ON LABOR

SENATE LABOR AND HUMAN RESOURCES COMMITTEE

WASHINGTON, D. C.

MARCH 11, 1982

My name is Edward S. Riss, and I serve as the President of Republic Industries, Inc. I would like to thank the Committee for allowing me the opportunity to testify before it this morning.

It is my purpose today to give this Committee some insight into what has happened to a firm already in receipt of astronomical liability claims brought about by the retroactive application of the withdrawal liability provisions of the Multi-Employer Pension Plan Amendments Act of 1980. Perhaps the cruelest feature of this legislation, as it applies to us, is that this liability did not exist at the time of our subsidiary's withdrawal from any pension plan. It was instead created later and applied retroactively to it and other firms going out of business during the same period. This, of course, effectively denied us the opportunity to seek any other alternative which might have precluded its imposition.

Additionally, the Act seeks to satisfy this liability, not only by seizing the assets of the entity ceasing operation, but also by seizing the assets of any and all entities within a "controlled group" of corporations, as defined in the Internal Revenue Code. In our situation, these other corporations operated independent of the withdrawing entity, were in existence prior to Republic's purchase of that entity, and are not now participating in any of the business handled by the entity prior to its cessation of operation.

BACKGROUND HISTORICAL INFORMATION

Republic Industries, Inc. is a privately owned holding company, headquartered in Kansas City, Missouri. On May 4, 1978, Republic entered into contracts to purchase Johnson Motor Lines, Inc.

Johnson was a large motor carrier, operating along the Eastern Seaboard from New England into the Carolinas and Georgia, then through the Gulf states into Texas. Johnson was a contributor to a number of multi-employer pension plans.

The purchase contracts specified that the purchase price paid by Republic to the stockholders of Johnson would be the net book value per share of Johnson, as reflected in audited statements of December 31, 1977. The same, very well-respected Big Eight accounting firm which audited and certified Johnson's statements as of that date also audited Republic's statements and those of the Central States Southeast and Southwest Areas Pension Fund. There was no mention, either on Johnson's balance sheet or in footnote form of any withdrawal liability -- potential or otherwise -- to the Central States Fund or to any of the other pension funds to which Johnson was a contributor.

Additionally, the labor contracts and pension plan participation agreements to which Johnson was a signatory and under which Johnson was obligated to make payments to the various plans were reviewed prior to the acquisition. These contracts specifically limit Johnson's liability to those plans to the amounts per man hour specified in those contracts and agreements.

On March 16, 1979, the Interstate Commerce Commission approved Republic's application for permission to acquire and control Johnson. On June 14, 1979, Republic acquired and assumed control of Johnson for a purchase price of approximately $16,800,000.

During the following year, the advent of motor carrier deregulation, surging interest rates and a general rate level/labor cost imbalance threatened the viability of Johnson and other carriers in similar situations. After reviewing and exhausting a number of alternatives, Johnson had little choice but to announce on July 30, 1980, that it would close its doors and not accept shipments from customers after August 8, 1980.

From that point, the orderly liquidation of Johnson proceeded, involving primarily an auction of parts and equipment and the sale of real estate. The proceeds of those activities were utilized to fully satisfy all of Johnson's known obligations and liabilities in a fair, orderly and timely fashion.

Additionally, all of Republic's banking debt associated with the Johnson acquisition has been fully repaid.

ECONOMIC IMPACT

As you know, Congress sent the Multi-Employer Pension Plan Amendments Act of 1980 to President Carter on September 19th of that year, and it was signed by the President on September 26th -- nearly two months after Johnson elected to cease operation. Its provisions for withdrawal liability -- applied after the fact -- have resulted in the following claims being filed against Johnson by the various pension plans to which Johnson was a contributing employer:

NAME OF PENSION FUND FILING CLAIM	DATE CLAIM RECEIVED	AMOUNT OF CLAIM
Central States, Southeast and Southwest Areas Pension Fund	7/1/81	$16,658,936.94
New England Teamsters and Trucking Industry Pension Fund	8/21/81	1,402,961.00

NAME OF PENSION FUND FILING CLAIM	DATE CLAIM RECEIVED	AMOUNT OF CLAIM
Central Pennsylvania Teamsters Pension Fund	11/23/81	$ 848,494.00
Trucking Employees of North Jersey Local 560 Pension Fund	1/29/81	599,112.50
Teamsters Council No. 83 of Virginia Pension Fund	7/7/81	189,107.00
TOTAL		$19,698,611.44

At no time -- before or after July 30, 1980 -- until October of that year, when Johnson received a letter from Central States reporting its intent to make a claim under the Act, did any officer or director of Republic, or to the best of my knowledge, any officer or director of Johnson, have any knowledge of the Act, its withdrawal liability provisions, or any indication that Johnson might have any liability to Central States or any other multi-employer pension plan, other than the contractual liability mentioned earlier.

Yet, Republic, as a result of its acquisition of Johnson, is saddled with withdrawal liability claims imposed retroactively upon it, and totalling nearly $20,000,000, after having purchased Johnson some 14 months before for $16,800,000. The aggregate claim figure exceeds:

A. The purchase price paid for Johnson.

B. Johnson's net worth.

C. The cumulative net earnings of Johnson since its inception in 1945.

D. The net worth of Republic Industries, itself.

The incredible prospect of our making a lump sum payment of our aggregate claim liability is mind boggling. The Act also provides an equally ludicrous formula for determining the amount and number of payments required to pay off the liability on an installment basis. Under the formula, our annualized payments to the various plans would approach $4,000,000 a year, for a period in excess of six years. This yearly amount greatly exceeds the payments made by Johnson to the plans during any of its years of full operation.

To accentuate the problem, the Act requires that these payments begin within 30 to 60 days after receipt of a claim from a plan. Failure to make any of the installment payments results in the immediate acceleration of the entire liability.

To protect ourselves against this onslaught, we are currently involved in litigation in four separate Federal District Courts, in which we challenge the constitutionality of the statute, particularly as it is retroactively applied to Johnson. Ours was the first of over sixty lawsuits that have been filed and raise similar issues of constitutionality. Our legal and actuarial fees already exceed a quarter of a million dollars, and will surely increase as the wave of litigation continues.

PROPOSAL FOR A LEGISLATIVE REMEDY

Legislation should be enacted immediately to eliminate the retroactive imposition of the provisions of the Act. The financial impact of the withdrawal liability provisions is so devastating that the negative ramifications of imposition of the liability, retroactively or otherwise, far outweigh any positive benefit to the plans therefrom.

TESTIMONY OF EDWARD S. RISS

PRESIDENT, REPUBLIC INDUSTRIES, INC.

SUMMARY FACT SHEET

1. May 4, 1978 - Republic enters into contracts to purchase Johnson Motor Lines, Inc.

2. June 14, 1979 - Republic acquires and assumes control of Johnson. The purchase price paid was $16,800,000.

3. July 30, 1980 - After exhausting all other alternatives, Johnson announces that it is closing its doors.

4. September 19, 1980 - Congress sends the Multi-Employer Pension Plan Amendments Act to the President.

5. September 26, 1980 - President Carter signs the Bill into law.

6. As a result, Republic Industries is retroactively saddled with withdrawal liability claims totalling nearly $20,000,000 after having purchased Johnson some 14 months before for $16,800,000. The claims greatly exceed:
   A. The net worth of Johnson Motor Lines.
   B. The cumulative net earnings of Johnson since its inception in 1945.
   C. The net worth of Republic Industries, Inc.

7. List of claims:

NAME OF PENSION FUND FILING CLAIM	DATE CLAIM RECEIVED	AMOUNT OF CLAIM
Central States, Southeast and Southwest Areas Pension Fund	7/1/81	$16,658,936.94
New England Teamsters and Trucking Industry Pension Fund	8/21/81	1,402,961.00
Central Pennsylvania Teamsters Pension Fund	11/23/81	848,494.00
Trucking Employees of North Jersey Local 560 Pension Fund	1/29/81	599,112.50
Teamsters Council No. 83 of Virginia Pension Fund	7/7/81	189,107.00
TOTAL		$19,698,611.44

8. Legislation should be enacted immediately to eliminate the retroactive imposition of the provisions of the Act.

Senator NICKLES. Your particular case is probably somewhat unique—not unique to the industry, but unique for the panels we have today—in that you really did get caught in the switch as far as between the times.

Mr. HANSEN. Right.

Senator NICKLES. Both of your transactions were actually being made, before the Act was passed and signed into law, but after it was made retroactive.

Mr. HANSEN. Yes.

Senator NICKLES. Mr. Hansen, are you in court?

Mr. HANSEN. Senator, we have been sued by the IAM fund for nonpayment of the withdrawal liability.

Senator NICKLES. Mr. Riss, is your major ground that it is unconstitutional primarily because it is an ex post facto law that has actually gone in and——

Mr. HANSEN. Senator, that is obviously a major portion of it. However, we feel that there are other provisions in the Act which are unconstitutional, as well.

Senator NICKLES. Mr. Hansen I am looking with interest at what happened to your employees. I am particularly considerate of them because they are Oklahoma voters.

You had, what, eight employees?

Mr. HANSEN. We had six employees retire, Senator.

Senator NICKLES. Six employees retired. You contributed into this over how many years?

Mr. HANSEN. From 1973 to 1980, we contributed $198,851.

Senator NICKLES. And six have retired. Are they 65 or older?

Mr. HANSEN. Yes, they are.

Senator NICKLES. Have you had an actuary determine what the present value of their future liability is?

Mr. HANSEN. Yes, we did, Senator. The liability would be $50,776 for those 6 employees.

Senator NICKLES. You could go out to a private insurance company or some type of vehicle, and actually purchase an annuity to provide them with the retirement benefits that they have earned, are promised, and are presently earning to date, for $50,000?

Mr. HANSEN. That is correct. The $50,000 is an actuarial computation, based on the same actuarial assumptions that the IAM Fund uses.

Senator NICKLES. It is relatively simple if you have a person aged 65 or 66, to purchase an annuity equal to whatever, depending on their age and so on.

Mr. HANSEN. That is correct.

Senator NICKLES. You say you have done that, and it is $50,000, but they sent you a liability bill that was equal to $155,000?

Mr. HANSEN. That is correct. Even though we had contributed $148,000 more than the $50,000 needed to fund these 6 employees, they sent us an additional bill for $155,000 to cover the unfunded liability in the fund.

Senator NICKLES. Do you have any information on the total fund of the International Association of Machinists?

Mr. HANSEN. No, I do not. We requested additional information from the fund, and they basically sent us a summary plan and put us off on most of our other questions.

Senator NICKLES. You had a lot of employees who had less than the 10 years of vesting that they had in their plan.

Mr. HANSEN. That is correct.

Senator NICKLES. So they get nothing? They have no transfer?

Mr. HANSEN. According to the IAM business representative, they get nothing, that is correct. They had 60 days to retire, and after that, they lost all vested interest.

Senator NICKLES. If they did not take early retirement or terminate from some other vehicle—and they have a vesting schedule that says you have a zero vesting percentage until you get up to 10?

Mr. HANSEN. That is correct. The plan that Ramsey Winch offered, we gave them credit for all past service, and then our vesting schedule is based on 5 years, it is 25 percent, and then it increases 5 percent per year, so they are vested much earlier under our vesting schedule.

Senator NICKLES. You came up with an alternate plan, a plan that I am assuming your employees would much prefer to be under because it has a shorter vesting schedule.

Mr. HANSEN. Greater benefits. The employees actually took a vote and voted to get out of the IAM plan and get into Ramsey Winch's plan, because we did offer better benefits.

Senator NICKLES. You feel some outrage at the fact that you have put in $198,000, and the present value of the benefits of the employees that you have contributed for is $50,000, and then they turn around and tell you that they want another $155,000?

Mr. HANSEN. Extremely, yes.

Senator NICKLES. I think you have a pretty legitimate complaint. Mr. Riss, a couple of questions, and I understand we will be going to the floor shortly. In your particular case, do you know what the Teamsters' position is on your case?

Mr. RISS. We have had no direct conversations with them, but it is my understanding that the Teamsters support a legislative solution to this problem—whether that is 1748 or not, I do not know. But I believe they support a legislative solution of some kind.

Senator NICKLES. I was aware of that, and we will have testimony from them on the 17th of this month. But in particularly your case, are they opposing you in the lawsuit.

Mr. RISS. Well, we are the plaintiffs in all of our lawsuits, and as such, yes, it is an adversary proceeding.

Senator NICKLES. In your case, you are talking about withdrawal liabilities in the multimillions of dollars—$16 million?

Mr. RISS. Nearly $20 million, Senator; $16.6 million from one plan alone.

Senator NICKLES. $16 million from Central States, and a few from some of the others.

Mr. RISS. Right.

Senator NICKLES. In his case, we found the benefits they were going to receive seemed to be way out of proportion to net liability. Have you found that type of situation also?

Mr. RISS. Senator, I do not think there is any question that it would be possible—and let us take Central States, for example—to structure a portfolio of highgrade, fixed income securities that would fund the benefit outflows involved over a 30- or 40-year period, whichever they are utilizing, at a far less initial cost than $16.6 million.

Senator NICKLES. Gentlemen, I appreciate your input before the subcommittee, and I apologize somewhat for the necessity to move as we have.

For all of the panelists that we have today there is a great deal of interest in the Senate and in the House, in this particular type of legislation. I would expect that other members of this subcommittee will possibly examine, or their staffs will examine your statements, and they may have some additional questions. I am sure I would like to get into your $20 million liability to a greater extent.

It is quite possible that we will be requesting supplemental questions we would like to include in the record to somewhat complete any questions the members might have. We will keep the record open for some time to accomplish that.

Our next panel includes Mr. Don Gardner, director of operations, National Association of Retail Grocers of the United States; Denis R. Zegar, director, government services, National-American Wholesale Grocers' Association; Laurence S. Fordham, of Foley, Hoag & Eliot, on behalf of C. & S. Wholesale Grocers, Inc.; and Mr. James E. LaCrosse, chairman and president of Wine Spirits Wholesalers of America, Inc.

Senator Quayle, did you have a statement?

Senator QUAYLE. I just want to very briefly, Mr. Chairman, if I can, pay a special welcome to a constituent of mine, Mr. Jim LaCrosse, who is President of the National Liquor Corp., in Indianapolis, Ind. Mr. Chairman, he will be very insightful in some of his testimony, because he has received a withdrawal liability assessment from Central States' Pension Fund for some $443,000; that sum is 50 percent of the net worth of his company. He has first-hand experience. I have talked to him briefly about the problem, and I think that you will find his testimony very rewarding and beneficial, as I have. It is an additional pleasure to welcome him here to Washington.

I do have to leave, and I thank the indulgence of the chair, and again commend you for having these hearings, and we will be looking forward with all deliberate speed to try to rectify the inequity that was created in 1980.

Thank you, Mr. Chairman.

Senator NICKLES. Thank you, Senator.

Mr. Gardner, would you care to proceed?

STATEMENT OF DON GARDNER, DIRECTOR OF OPERATIONS, JUMBO MARKETS, INC., ON BEHALF OF NATIONAL ASSOCIATION OF RETAIL GROCERS OF THE UNITED STATES, ACCOMPANIED BY BRUCE CONHAIN; DENIS R. ZEGAR, DIRECTOR, GOVERNMENT SERVICES, NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION; LAURENCE S. FORDHAM, ATTORNEY, ON BEHALF OF C. & S. WHOLESALE GROCERS, INC., ACCOMPANIED BY LESTER COHEN, PRESIDENT OF C. & S. WHOLESALE GROCERS, INC.; AND JAMES E. LA CROSSE, CHAIRMAN AND PRESIDENT, NATIONAL LIQUOR CORP., ON BEHALF OF WINE & SPIRITS WHOLESALERS OF AMERICA, INC., A PANEL

Mr. GARDNER. In the interest of time, I have revised this a couple of times this morning.

My name is Don Gardner. I am director of operations of an independent market called Jumbo Markets, in Sacramento, and I am accompanied by our labor counselor, Bruce Conhain. My statement is supported by the National Association of Retail Grocers, the California Grocers' Association, and others, as listed.

The passage of the Multiemployer Pension Benefit Amendments Act of 1980, specifically the withdrawal liability portion, has placed affected employers in serious jeopardy. The grocery industry in California, a long-time contributor to multiemployer pension plans with several unions, has been particularly hard hit. In northern California alone, contributing employers to the Retail Clerks Pension Trust Fund collectively face an unfunded vested liability of over $400 million. The amortization period on this by the Fund has been estimated at 22 years, if everything stays even.

Companies such as Jumbo Markets, based in Sacramento, have over the past 5 years paid contributions totaling $1.3 million, only to find that were they to withdraw from the plan, they would owe nearly $2.2 million, which represents approximately one-third of our net worth.

Senator NICKLES. Jumbo Markets have a separation liability of $2.2 million?

Mr. GARDNER. Yes.

We currently have about 400 employees, and just for your information, because I know it was asked before, the current assets of the fund at this point are estimated at this point at $125 million, with a current future liability of $400 million.

Senator NICKLES. Is that $400 million of future liability the present value of vested liability?

Mr. GARDNER. Yes.

Senator NICKLES. What fund is that?

Mr. GARDNER. Northern California Retail Clerks food plan.

Senator NICKLES. It has a present vested pension liability of $400 million, and it has an asset value of $125 million.

Mr. GARDNER. Yes.

Senator NICKLES. Go ahead.

Mr. GARDNER. There must be provisions made to exempt certain industries from coverage under this act beyond those that are already exempt. The grocery industry certainly qualifies for such an exemption, since it is a vital industry that the public cannot do without. While employers particularly in the independent segment of the industry may enter and leave the business from time to time, the slack is almost always taken up by successor owners. Often, not even an hour of work is lost by an employee when his employer sells the business and new ownership takes over. Under such circumstances, there should be no penalty assessed against the selling employer. In such instances, neither the employees involved nor the pension plan involved have been adversely affected.

In our particular company, this has a real effect, because our owners, the two principals, are getting up in age. They are interested in probably selling the company; it is a viable company to be sold. However, as a result of this Act—and we just had this happen in another independent company in that area—the company could not be sold because of its unfunded liability, and thus, the sale fell through, which has been mentioned earlier in some other instances here.

In order to maintain the integrity of the collective bargaining process, the withdrawal liability provision must be drastically changed, as proposed by Senator Hatch. All labor unions are not in accord with what the 1980 law has done. Selfishly, it has made new organizing virtually impossible, as employers would rather face a long strike than millions of dollars of liability when they become part of a multiemployer plan.

At the very least, if an employer does sign a new labor contract, he would almost assuredly resist any participation in a jointly administered multiemployer trust. Labor is becoming increasingly aware of the posture management is taking at the bargaining table with regard to pension funding.

Depending upon each employer's individual liability to the fund as presently calculated, the unions will be faced with a separate pension proposal from each of more than 200 companies. Administratively, this could be a nightmare.

It is expected that moneys that might otherwise be allocated to wage increases would be slated to reducing or eliminating the unfunded liability. This type of bargaining position has serious implications and could force the negotiating parties to take positions that could result in long and bitter strikes, strikes that would neither benefit the industry nor the unions.

In conclusion, I urge the Committee and the Congress to support exempting fixed contribution multiemployer pension plans from title IV of ERISA, as proposed in S. 1748.

Senator NICKLES. Thank you very much. We appreciate your statement.

[The prepared statement of Mr. Gardner follows:]

STATEMENT BY

Don Gardner, Director of Operations, Jumbo Markets, Inc.
5820 South Land Park Drive, Sacramento, CA 95822

ON SB 1748 - Hatch

The Multiemployer Pension Stabilization Act

BEFORE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

Labor Sub Committee

March 11, 1982

I am Don Gardner, Director of Operations for Jumbo Markets, 5820 South Land Park Drive, Sacramento, CA 95822. I am accompanied by our Labor Counselor Bruce Conhain of Oakland, California. My statement has the support of the following associations:

National Association of Retail Grocers
California Grocers Association
Retail Grocers Association of Florida
Illinois Food Retailers Association
Mid Atlantic Food Dealers Association
Minnesota Food Retailers Association
Pennsylvania Food Merchants Association
Texas Retail Grocers Association
Vermont Retail Grocers Association
West Virginia Association of Retail Grocers
Northern California Grocers Association
Southern California Grocers Association
Utah Retail Grocers Association

The passage of the Multi-Employer Pension Benefit Amendment Act of 1980, specifically the withdrawal liability portion, has placed affected Employers in serious jeopardy. The grocery industry in California, long-time contributors to multi-employer pension plans with several unions, has been particularly hard hit. In Northern California alone, contributing employers to the Retail Clerks Pension Trust Fund collectively face an unfunded vested liability of over 400 million dollars. Companies such as Jumbo Markets, based in Sacramento, have, over the past five years, paid contributions totalling 1.3 million dollars only to find that were they to withdraw from the plan, they would owe nearly 2.2 million more.

The ramifications of this liability are extremely ominous. If the law was passed to guarantee stability of multi-employer plans, it has missed the mark by a wide margin. Many independent grocers bargaining jointly throughout California have taken a position that no further contributions to improve benefits will be made to the Fund unless and until they are relieved of all withdrawal liabilities. This hardly benefits the participants in the Plan but is a necessary step to protect the interests of the Employer.

What is urgently needed is a revision of the MPPAA in several areas. First, in those Plans where the parties have negotiated a fixed contribution rate, rather than specific benefit levels, should be exempt from any withdrawal liability. The negotiating parties in such instances make no commitment to a specific retirement benefit and the employer must not therefore be held responsible for what the trustees of a plan do with the monies remitted. The Employer is no more responsible for that than is the union, and unions bear no financial burden under this law.

Second, a revision is needed to take into account the withdrawal of an employer from a plan where such withdrawal causes no adverse actuarial effect on the remaining participants of the plan. It is inequitable to assess a penalty on an employer when his departure from the trust has no measurable adverse effect. The de minimus deduction does not protect even relatively small employers, as there have been instances where companies with as few as five employees have been assessed penalties in excess of $30,000 after the deduction has been applied.

Third, there must be provisions made to exempt certain industries from coverage under this Act, beyond those that are already exempt. The grocery industry certainly qualifies for such an exemption since it is a vital industry that the public cannot do without and an industry of basic stability. While employers particularly in the independent segment of the industry may enter and leave the business from time to time, the slack is almost always taken up by successor owners. Often, not even an hour of work is lost by an employee when his employer sells the business and new ownership takes over. Under such circumstances there should be no penalty assessed the selling employer. In such instances, neither the employees involved nor the pension plan involved has been adversely affected.

Another serious negative effect on multi-employer plans as a result of the withdrawal liability is the fact that it has become a deterrent to newly organized employers to enter such plans. There are few plans that can withstand stagnation and long periods of time without new participants to replace those who have left. The net effect is that those that are left face an even greater burden as the plan population declines. In California, an increasing number of grocery companies are operating non-union. Organizational efforts by the United Food and Commercial Workers Union have been largely unsuccessful even with large multiple operators who are under contract in many geographic areas. Should this trend continue, plan population will decline substantially. Even in cases where an employer is organized and signs a labor agreement he will strenously resist becoming a party to a multi-employer plan as long as the danger of a huge liability exists.

The presently depressed economy has brought into play yet another negative aspect of this Act. The closure of stores, factories, and other businesses because of sagging economic conditions triggers a liability as does a major cutback or layoff of employees. Thus, when an employer implements a layoff in an attempt to cope with slumping business conditions he faces the real possibility of incurring an additional financial obligation to the trust fund. An employer who stremlines his operation over a period of years to reduce operating costs and increase efficiency will face a 100% withdrawal liability if he experiences a 70% decline in contributions to a plan for three consecutive years compared to an average contribution for the two highest years in the five years prior to the three consecutive years of 70% decline.

The employer who chooses to consolidate operations or transfers work to another location faces a partial withdrawal liability. If a grocer, as an example, were to close certain stores within the jurisdiction of a labor agreement or plan, and continue to operate other stores within those same jurisdictions, the Act imposes liability when the plan loses contributions. Several California grocery companies have closed stores because they have become unprofitable. They face the possibility of being required to continue contributions to the multi-employer plan even though they no longer have any employees working there.

In order to maintain the integrity of the collective bargaining process, the withdrawal liability provision must be drastically changed as proposed by Senator Hatch. All labor unions are not in accord with what the 1980 law has done. Selfishly, it has made new organizing virtually impossible as employers would rather face a long strike than millions of dollars of liability when they become part of a multi-employer plan. At the very least, if an employer does sign a new labor agreement, he would almost assuredly resist any participation in a jointly administered multi-employer trust. Labor is becoming increasingly aware of the posture management is taking at the bargaining table with regard to pension funding. California grocers are taking a position that there be no monies allocated to improving pension benefits unless and until the unfunded vested liability is either drastically reduced or eliminated. Depending upon each employer's individual liability to the funds, as presently calculated, the unions could well be faced with a separate pension proposal from each of more than two hundred companies. Administratively, this could be a nightmare.

It is expected that monies that might otherwise be allocated to wage increases would be slated to reducing or eliminating the unfunded liability. This type of bargaining position has serious implications and could force the negotiating parties to take positions that could result in long and bitter strikes; strikes that would neither benefit the Industry or the unions.

In conclusion, I urge the committee and the Congress to support exempting fixed contribution multi-employer pension plans from Title IV of ERISA as proposed in SB 1748. Passage of this legislation is a necessary first step to eliminate imposing destructive liabilities on employers negotiating contribution levels in their collective bargaining agreements.

Senator NICKLES. Mr. Zegar?

Mr. ZEGAR. Thank you, Mr. Chairman.

My name is Denis Zegar. I am the executive director Government Services for the National-American Wholesale Grocers' Association. On my right is Mr. Bill Borghesani, who is NAWGA's transportation counsel.

I might quickly mention that the passage of the Multiemployer Pension Plans Amendments Act of 1980 has caused serious problems and devastating effects on many of NAWGA's companies, including C. & S. Wholesale Grocers, who is on my left, and is a NAWGA member.

We currently have one-half-dozen members who are presently in litigation or plan to file litigation over multiemployer withdrawal liability. These liabilities range from $86,000 to almost $10 million.

It is unbelievable that, in our industry, which is one of the most competitive industries in the country, we are prohibited from consolidating unproductive warehouses into more modern facilities and pass on the savings to the consumer. This is being prohibited right now because it would trigger either full or partial withdrawal liabilities.

I might also add that the passage of the 1980 Act, is in direct conflict with the Motor Carrier Act of 1980, which deregulated the trucking industry and extended private and regulated carriers operational alternatives previously unavailable.

The Multiemployer Act effectively prevents wholesale grocers and other operators of trucking fleets from utilizing these new provisions of the Motor Carrier Act, which was designed to make trucking operations more competitive.

My conclusion, Congress included in the Multiemployer Act of 1980 this trucking exemption with very limited applicability. The requirement that a qualifying plan receive substantially all of its contributions from employers primarily in the long haul and short haul trucking industries, the household goods moving industry, or the public warehouse industry, limits the number of plans to which the exemption applies.

The PBGC can limit the applicability of the exemption by deciding that a given withdrawal will cause substantial damage to the plan.

NAWGA recommends the elimination or substantial modification of the qualifying condition described above and the imposition of standards on the PBGC's determination of substantial damage. NAWGA desires to broaden the reach of the trucking exemption so that more employers in the trucking industry, including private carriers, can qualify for the exemption without triggering withdrawal liability.

I will submit the rest of my statement for the record, and I thank you.

Senator NICKLES. Thank you very much. I appreciate that, Mr. Zegar.

[The prepared statement of Mr. Zegar follows:]

TESTIMONY OF
DENIS ZEGAR
ON BEHALF OF
THE NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION

BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

March 11, 1982

I

PRELIMINARY STATEMENT

I am Denis Zegar, Director of Government Services for the National-American Wholesale Grocers' Association (NAWGA). I am submitting this statement on NAWGA's behalf in support of S. 1748, the bill which would amend both the Multiemployer Pension Plan Amendments Act of 1980 (the "MPPAA" or "the Amendments Act") and the Employee Retirement Income Security Act of 1974 (ERISA). NAWGA is a national trade association representing nearly 400 independent wholesale grocers and food service distributors. These companies, both large and small, supply grocery products and provide a wide array of services to retail grocery stores, hospitals, schools, restaurants and other food service establishments throughout the United States. Marketing products from over 800 separate distribution centers, NAWGA member companies account for nearly $50 billion of the Nation's grocery product volume and 1/3 of the grocery supply distributed nationally. NAWGA's food service division, the International Food Service Distributors' Association (IFDA), represents member firms who sell annually over $10 billion in food and related products to the institutional, away-from-home food service market.

Many of NAWGA's member firms maintain extensive private carriage fleets to transport goods to facilitate their non-transportation endeavors. They implement such carriage via reliance upon directly employed and/or leased drivers. A number of NAWGA members are subject to collective bargaining agreements under which they contribute to various multiemployer pension funds. In fact, more than 1/3 of all NAWGA members contribute to the Teamster Central States, Southeast and Southwest Areas Pension Fund.

Many NAWGA members have also established separate, wholly owned trucking subsidiaries to conduct private carriage and transportation activities subject to regulation by the Interstate Commerce Commission (ICC). These subsidiaries have then employed unionized drivers and contributed to multiemployer pension plans on their behalf.

Since the enactment of the Amendments Act in September of 1980, withdrawal liability has become a very important consideration to NAWGA and its members. NAWGA recently distributed a questionnaire to solicit information from its members concerning withdrawal liability problems. In addition, this area was a crucial topic of discussion at NAWGA's recent Financial Management Seminar. The general response from its members indicates to NAWGA that multiemployer pension plan withdrawal liability is a serious problem which imposes restrictive and unfair burdens on wholesale grocers' attempts to conduct their businesses with optimal efficiency.

The foregoing substantiates NAWGA members' involvement with multiemployer pension plans, especially those relating to the Teamsters, and their resulting exposure to the withdrawal liability provisions of the MPPAA. Therefore, NAWGA is an interested party at this hearing and a supporter of S. 1748, which would greatly ease the potential withdrawal liability burden currently on NAWGA members and others in similar positions.

II

INTRODUCTION TO THE PROBLEM: REACTION TO MARKETPLACE CONDITIONS

The withdrawal liability provisions of the Amendments Act impair a business' ability to react successfully to changes in its economic surroundings. They especially frustrate operators of private and ICC-regulated motor carrier fleets because the MPPAA unavoidably conflicts with the Motor Carrier Act of 1980 (the "MCA") and the new options it made available to private and regulated carriers as well as the shippers and receivers of goods transported by truck.

The Motor Carrier Act of 1980 deregulated the trucking industry and extended to private and regulated carriers operational alternatives previously unavailable. Liberalized entry into the motor carrier industry, the augmentation of traffic exempt from the Interstate Commerce Commission's regulation and the designation of compensated intercorporate hauling as lawful private carriage have generally increased motor carriers' freedom and flexibility to adjust to the economic realities of their business environments. In addition, the MCA's amendment of the National Transportation Policy included a provision which emphasizes the promotion of productivity and efficient use of energy resources. Thus, the MCA was and is a dynamic legislative approach to changing economic demands perceived in the motor carrier industry.

The MPPAA confronts the MCA's emphasis on adaptation to prevailing circumstances with the encouragement of the status quo. It penalizes the employer who, in response to economic necessity, chooses a course of action which interrupts his contributions to any multiemployer pension plan. Thus, in many cases, the MPPAA takes away that which the MCA has given to wholesale grocers and other operators of trucking fleets.

The withdrawal liability problem is dramatically heightened by certain economic realities faced by many businesses. The entire nation is experiencing a deepening recession which increases the need for keen business judgment and the flexibility to implement that judgment in the pursuit of economic advantages. The pressure to adapt to changing circumstances in order to protect one's business interests continues to intensify. However, the possibility of large withdrawal liability assessments and their financially crippling effects will continue to inhibit the affected employers' taking of necessary steps to improve their respective economic situations.

In addition, high labor costs in the trucking industry plague private and regulated motor carriers. Even with the new, recently ratified National Master Freight Agreement, labor costs in organized trucking operations will be approximately 30% higher than those in non-unionized motor carrier fleets. Burdensome operating costs impair a business' financial viability and lead to shut-downs and initiatives to cut labor costs which, in turn, exacerbate the withdrawal liability problem.

III

EFFECTS ON NAWGA MEMBERS

Many of NAWGA's member firms have already felt the MPPAA's impact. Some members have received financially onerous liability assessments. Other have calculated their potential withdrawal liability and expressed their apprehension of its chilling effect on corporate flexibility.

Two NAWGA members have reported withdrawal liability assessments provoked by their respective employees' decisions to leave the multiemployer pension plans to which the companies had been contributing. In one case, the employees voted to withdraw in favor of a private plan. In the other case, the company employees selected Investment Retirement Accounts in lieu of continuing their affiliation with the multiemployer plan involved. Each of these employee-initiated actions resulted in the discontinuation of contributions to the corresponding plan. Each evoked withdrawal liability for which the employer was billed.

Thus, it is quite clear that under the MPPAA a voluntary decision by a company's employees to terminate their affiliation with a given multiemployer plan can impose severe financial penalties on the employer. This is grossly unfair to both the employer and his employees.

Withdrawal liability assessments which impair the financial soundness of the employers involved could, in some instances, result in reduced wages (or reduced wage increases), layoffs, or other economic adjustments not in the best interests of the employees. The employer would be motivated not by vindictiveness or anti-union hostility, but by his own self-interest to survive during economically difficult periods. In addition, the employer is stripped of any incentive to provide a better pension plan than the multiemployer plan in existence. Under these circumstances, the employees suffer indirectly from the exercise of their free will. This consequence is certainly contrary not only to the intent of Congress when it enacted the MPPAA, but to the spirit of the entire body of federal labor law. The employer is also harmed unduly. He suffers a financial loss caused by an event beyond his control.

Another NAWGA member has reported a withdrawal liability assessment caused by its relocation of an operating unit. Relocation of all or part of a wholesale grocer's operations to an area not encompassed by a given multiemployer plan or plans evokes withdrawal liability because it interrupts the flow of contributions into at least one such fund. The withdrawal liability bill in this case was nearly $1 million.

C&S Wholesale Grocers, Inc. (C&S) is the NAWGA member involved. Like many other employers throughout the country, it has commenced litigation challenging the constitutional validity of the MPPAA's withdrawal liability provisions. In fact, C&S' attorney in that case is testifying today on this very panel. C&S has alleged that the statute violates due process by:

1. impairing pre-existing contract rights and imposing liabilities for which employers did not bargain;
2. depriving a contributing employer of his property without compensation;
3. establishing a binding arbitration procedure which includes the presumption that liability assessments by trustees charged with protecting employee interests are correct; and
4. depriving the employer of judicial review and a fair, impartial adjudication of any kind.

The wholesale grocer-plaintiff has also argued that the arbitrarily devised exemptions contained in the statute deny him equal protection under the law. C&S has requested the Court to require that multiemployer plan trustees choose the liability calculation method which least impairs the contractual rights contained in the collective bargaining agreement to which he is signatory.

NAWGA would add to the arguments outlined above the irreparable injury caused by the MPPAA's withdrawal liability. This injury takes two basic forms: (1) large liability assessments, sometimes in excess of net worth, and (2) the unrecoverable loss of sales and profits caused by the inability to relocate, sell assets, borrow money or take other necessary actions which could evoke unmanageable withdrawal liability.

Circumstances in Which Withdrawal Liability Could Occur

Perhaps the most insidious problems caused by the MPPAA are those related to corporate stagnation. Potential withdrawal liability reinforces the status quo by deterring NAWGA members and other employers from implementing proposals which would otherwise benefit their businesses. The possibility of devastating liability bills thereby greatly inhibits managerial freedom.

The discussion which follows below presents situations in which complete or partial liability could occur in the wholesale grocery industry. These "hypotheticals" assume:

1. that the wholesale grocer is a party to one or more collective bargaining agreements; and
2. that he consequently participates in at least one multiemployer pension plan which covers his unionized employees.

This portion of the testimony will show the many circumstances in which withdrawal liability can strip wholesale grocers of much of their ability to cope with their economic environment and take advantage of prevailing opportunities.

Complete Shut-Down

The event which most clearly triggers complete withdrawal liability is the total shut-down. A wholesale grocer (WG) going out of business would necessarily cease operations covered by any multiemployer pension plan in which it participated; it would discontinue all contributions to the plan(s). This would constitute one or more complete withdrawals for which liability could be excessive. One NAWGA member has calculated a potential liability of $3,000,000 for a total closing of operations.

Another, which contributes to three different multiemployer plans, has determined that if it were to cease all operations, its liability would total $9,000,000.

Termination of Private Carriage Activity

The wholesale grocer which desires to cease private carriage operations and contract with outside regulated carriers faces a withdrawal liability problem. Although this wholesale grocer would be closing a portion of its operations, such action could result in complete withdrawal liability.

For instance, a NAWGA member might contribute to a given Teamster plan or plans which cover its drivers but none of its non-trucking employees. In this case the elimination of private carriage activity would result in the member's discontinuation of all contributions to the Teamster plan(s). The result would be at least one complete withdrawal from at least one plan.

It is, however, possible that the cessation of private carriage activities would constitute a partial withdrawal. If warehousemen were included with drivers under the same multiemployer plan(s), then the elimination of trucking operations would leave the employer with some obligation to contribute to the plan(s) on behalf of the warehouse workers. If this obligation were reduced by 70% for three successive years with respect to at least one plan, a partial withdrawal would occur.

A partial withdrawal could also result from the elimination of a portion but not all of the wholesale grocer's private carriage activities. A wholesale grocer might cease trucking operations covered by one or more labor agreements but continue some private carriage within the geographic area covered by the same multiemployer pension plan which covered the terminated operation(s). This could constitute a partial withdrawal. A partial withdrawal of this kind is more likely when the plan involved is one with a wide geographic coverage, such as the Teamster Central States Plan, Southeast and Southwest Areas Pension Fund.

Sale of Business

The wholesale grocer which desires to sell its business must satisfy certain conditions to avoid immediate withdrawal liability. The wholesale grocer-seller would specifically need to:

(1) require that the buyer, which must be an unrelated party, contribute to the plan for substantially the same number of contribution base units for which the wholesale grocer-seller was required to contribute;

(2) have the buyer provide for a period of years a bond or escrow in an amount equal to the greater of the average annual contribution required of the seller for the 3 plan years preceding the sale, or the annual contribution that the seller was required to make for the last plan year before the sale. (This bond or escrow will be paid to the plan if the buyer withdraws from the plan or fails to make a contribution to the plan when due at any time during the first five plan years following the sale); and

(3) provide in the contract for sale that if the buyer withdraws either completely or partially during the first five years and fails to pay the liability due, then the seller-wholesale grocer will be secondarily liable for any withdrawal liability which it would have had if these transfer provisions had not been invoked.

Thus, the sale of its business would place the wholesale grocer-seller in a precarious position. First, it would need to ensure the satisfaction of each condition described above in order to avoid withdrawal liability. Second,the seller would remain secondarily liable for a period of five years, which would restrict its future business activities.

Moreover, these transfer conditions seriously impair the wholesale grocer's ability to sell his business or assets. Prospective buyers might be reluctant to acquire the WG's business with obligations to contribute to a multiemployer plan and the related possibility of withdrawal liability. NAWGA members have expressed concern that their calculated liabilities could stymie efforts to sell their businesses if necessary, especially in a declining economy.

In addition, a wholesale grocer who wishes to acquire a business contributing to a multiemployer pension plan must consider the impact on its operations of accepting the existing contributory responsibility and the potential withdrawal liability. The necessity of posting a bond or escrow would further reduce the attractiveness of such an acquisition.

Union Decertification

The decertification of a union in a given bargaining unit often provides an employer with benefits such as increased managerial flexibility and reduced labor costs. It also often demonstrates that the employees are satisifed and do not perceive the need for union representation.

However, the withdrawal liability provisions of the MPPAA have made many wholesale grocers and other businesses uneasy about union decertification. Decertification in a unit covered by a multiemployer plan would negate the collective bargaining relationship previously established, and any remaining agreement between the parties would be null and void. This would result in the discontinuation of contributions to the plan and, therefore, a partial or complete withdrawal, depending on whether or not the employer was a party to any other agreements encompassed by the same plan.

The potential withdrawal liability caused by union decertification imposes potentially severe financial consequences upon employers for events which they do not control. It penalizes the employer whose employees make their own decisions for any reason to forsake union representation. Consequently, a number of NAWGA members have indicated concern over the decertification issue.

In addition, a wholesale grocer could also bargain with its employees' representative to eliminate its contributory obligation under a multiemployer pension plan. However, it would presumably not succeed unless the employer were to establish a substitute plan. This substitution could evoke withdrawal liability similar to that incurred by the two NAWGA members discussed above.

Reduction in Work Force

Substantial reductions in an employer's work force due to economic layoff, automation (potentially relevant to a warehouse facility), or other reason could lead to withdrawal liability. The layoff, automation or other reduction in force could be severe enough to eliminate the employer-wholesale grocer's obligation to contribute to a given plan under one labor agreement or in one facility. The resulting termination of the WG's contributory obligation would be a complete withdrawal, provided that the facility or agreement were the only one covered under the given multiemployer pension plan.

The WG might, on the other hand, be a party to other labor agreements or operate other facilities covered by that plan. In either case, partial withdrawal liability would ensue. It is also possible that layoffs affecting less than any one whole unit of employees would be severe enough to reduce the employer-wholesale grocer's contributory obligation by 70% over 3 successive years. This would also be a partial withdrawal.

Private Carriers Leasing Drivers

Wholesale grocers operating private trucking fleets and leasing drivers for these transportation operations cannot completely disregard the Amendments Act's withdrawal liability provisions despite the absence of covered drivers on their payrolls. These wholesale grocer-private carriers must consider their potential joint employer relationship to the lessor's drivers.

The exercise of control over the activities of leased drivers, as required by the Interstate Commerce Commission, has in many instances conferred joint employer status upon private carriers. The National Labor Relations Board (NLRB) and the courts have, in view of that status, regarded the carriers as parties signatory to the collective bargaining agreements in effect. A private carrier who is the co-employer of its leased drivers could incur withdrawal liability allocable to those drivers if the lessor-employer of the drivers in question were to withdraw from a multiemployer pension plan and fail to pay the liability imposed by that plan.

Switch to Use of Owner-Operators

A wholesale grocer operating a trucking fleet with directly employed drivers might at some time consider converting to the use of owner-operators. The Interstate Commerce Commission's recent decision in Ex Parte No. MC-122 (Sub-No. 2) permits private carriers to utilize owner-operators under the same rules and standards which guide such use by regulated carriers. Therefore, the wholesale grocer-private carrier will be able to utilize owner-operators as independent contractors. Conversion to the use of owner-operators as independent contractors would reduce or eliminate the company's direct employment of unionized drivers and, consequently, its obligation to contribute to a given Teamster multiemployer plan. It could thereby constitute a withdrawal.

If the conversion were to affect the WG's entire trucking operation covered by one plan which encompassed none of the WG's other employees, a complete withdrawal would occur. A complete withdrawal would also result if the WG were to convert to owner-operators in one part of its operations which represented the WG's entire obligation to contribution to a given plan. In each instance the impact on trucking endeavors entirely encompassed by one plan which covered none of the WG's other activities would make the conversion a complete withdrawal.

A conversion which terminates the employment of some but not all of a wholesale grocer-private carrier's drivers could also be a partial withdrawal. If the changes were to affect all drivers subject to one labor agreement or at one facility among two or more covered by the same plan, a partial withdrawal would occur. A switch to owner-operators which reduced the contributory obligation to one plan by 70% would also be a partial withdrawal.

The wholesale grocer might also establish a wholly owned regulated trucking subsidiary which would then convert to the use of owner-operators. The subsidiary and the parent would then be subject to withdrawal liability.

The conversion to the use of owner-operators by the subsidiary could occur, in practical effect, immediately following the transfer. In this instance, the transfer and the conversion could possibly be regarded as one transaction, with the discontinuation of contributions stemming from the initial transfer. If so, a finding that the WG-parent contemplated the conversion, and therefore, initiated the withdrawal would be possible. In that situation, the WG could be held at least secondarily liable to the plan.

In addition, the wholesale grocer might be responsible for withdrawal liability if the integration between the parent and its subsidiary were excessive enough to confer alter ego status upon the parent. Factors such as common management, common premises, common labor relations policies, and a close interrelationship in daily activities would be relevant to the factual determination of whether the parent-wholesale grocer and its subsidiary were intertwined to the degree necessary to deem them alter ego corporations. As its withdrawing subsidiary's alter ego, the parent would remain liable to the pension plan, especially if the subsidiary defaults on a liability payment.

Most importantly, 29 U.S.C. S1002(37) defines a controlled group which consists of a parent and subsidiary as one employer for the purpose of determining the existence of a multiemployer plan. If a parent and subsidiary are one employer within a multiemployer plan, then a parent-wholesale grocer can incur withdrawal liability for the actions of its subsidiary.

NAWGA'S SUPPORT OF S. 1748

NAWGA firmly supports S. 1748, Senator Orrin Hatch's bill which this Subcommittee is currently reviewing. The bill would exempt from Title IV of ERISA "fixed-contribution multiemployer pension plans" defined as those related to which collective bargaining agreements effective April 29, 1980, or the date of plan establishment, if later, set contributions and not benefit guarantees. Therefore, the bill would exempt from the MPPAA's withdrawal liability provisions many multiemployer plans now subject to such liability.

NAWGA supports S. 1748 for a number of reasons. First, it would help many of NAWGA's member firms, which have negotiated contributions to multiemployer plans but never guaranteed any benefit levels. This exemption would cover the many NAWGA members contributing to Teamster multiemployer plans, including the Central States, Southeast and Southwest Areas Pension Fund.

Second, this would eliminate the confiscatory nature of the MPPAA's present withdrawal liability provisions. Employers, including NAWGA members, who qualify for the exemption, would no longer be subject to the taking of their property without compensation and an opportunity to be heard in order to provide benefits to which the employer never agreed.

ALTERNATIVE SOLUTIONS

While NAWGA does support S. 1748, it also recognizes that other solutions to the withdrawal liability problem exist. NAWGA desires the most comprehensive cure possible for the economic paralysis fostered by the MPPAA's withdrawal liability provisions. Therefore, NAWGA recommends to this Subcommittee the following additional or alternative solutions which could help to relieve employers from this unnecessary and unfair burden.

The Trucking Exemption

The MPPAA currently contains an exemption for the trucking industry. It applies to those plans in which substantially all contributions are made by employers in the long-haul and short-haul trucking industry, household moving industry, or the public warehousing industry. Withdrawals from such plans will not evoke liability if: (1) the Pension Benefit Guaranty Corporation (PBGC) determines that no substantial damage to the plan's contribution base has occurred; and (2) the employer posts a bond or escrow equal to 50% of its potential liability.

The vagueness of the term "substantially all contributions" has severely restricted the applicability of this exemption. The legislative history surrounding H.R. 3904, the House withdrawal liability bill which preceded the MPPAA, indicates that 85% of a plan's contributions must come from employees primarily engaged in the above referenced industries to satisfy the "substantially all" requirement of the trucking exemption. See 126 Cong. Rec. H. 7900 (daily ed. August 26, 1980). This has effectively removed many plans in the trucking industry from the scope of this exemption due to the contributions made to these plans by private carriers such as NAWGA members whose principal businesses are non-transportation in nature. Thus, the term eliminates much of the relief which this statutory exemption could otherwise provide.

In addition, the PBGC is not given specific standards by which to judge whether the employer's withdrawal has caused substantial damage to the plan. The agency is apparently free to consider any number of factors in its determination of this issue and, therefore, it can restrict the applicability of this exemption .

Congress could improve the effectiveness of the trucking exemption by eliminating the prerequisite that the vast majority of contributions come from employers primarily in the trucking, household goods moving or warehousing industries. This would provide private carriers such as wholesale grocers with at least the chance of obtaining relief from withdrawal liability under the trucking exemption.

Private trucking fleets are the predominant form of motor carriage in the United States. Trucks operated by private carriers greatly outnumber those of carriers regulated by the ICC. A trucking industry exemption which by definition removes private carriers from consideration is impractical and unfair; it ignores the realities of the motor carrier industry .

In addition, the imposition of fair, specific standards on the PBGC in its determination of substantial harm would give all parties concerned a better idea of whether a particular corporate action would result in a withdrawal. This would enable the employer who otherwise qualifies for the trucking industry exemption to review thoroughly all relevant considerations before making a decision concerning the implementation of a given proposal. It would also remove from the PBGC the unbridled discretion to limit the scope of the trucking exemption.

The Trustee Problem

The severe problems caused by the MPPAA's withdrawal liability provisions stem from the fact that the liability, a share of the plan's unfunded vested benefits, can greatly exceed the amount of contributions negotiated by the employer. Benefits are set by the trustees who have the power to institute benefit levels far beyond the promised contributions of employers. These trustees are charged with the duty to act on behalf of employee-beneficiaries, with no significant regard to employer interests.

Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. §141 et seq., as amended, excludes pension funds from the statute's restrictions against payments to employer representatives. It describes pension funds as being "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents)". Section 302(c)(5) does provide for equal representation of employees and employers in the administration of pension funds.

However, the United States Supreme Court, in National Labor Relations Board v. AMAX Coal Co., A Division of AMAX, Inc., 453 U.S. ____, 101 S. Ct. 2789 (June 29, 1981), concluded that the trustee appointed by an employer need not, indeed should not, administer the fund in the interest of the employer. The Court emphasized the fiduciary duties established by ERISA at 29 U.S.C. §1104, which states that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries". The Court strongly restated the trustees' "unwaivering duty" to protect the beneficiaries' interests "to the exclusion of interests of all other parties". The Supreme Court held that the language and legislative history of 29 U.S.C. §302 (c)(5) and ERISA demonstrate that a pension fund trustee is a fiduciary whose duty to the fund's beneficiaries must overcome any loyalty to the interest of the party that appointed him. Therefore, the trustees in multiemployer pension plans have the legal duty and authority to set benefits at levels which enhance the interests of the employees without regard to those of the employer.

The employer who wishes to challenge the actions of pension plan trustees will receive very narrow judicial review, if any. The Courts have consistently held that the actions of trustees are proper unless they are arbitrary, capricious or without basis in law. The Courts give broad discretion to plan trustees to set benefit levels as they see fit and will rarely, if ever, second guess the trustees' decisions. See Aitkin v. IP & GCU-Employer Retirement Fund, 604 F.2d 1261 (9th Cir. 1979); Seafarers Pension Plan v. Sturgis, 630 F.2d 218 (4th Cir. 1980); Rosen v. Hotel and Retaurant Employees and Bartenders Union of Phila, Bucks, Montgomery, and Delaware Counties, PA., 637 F.2d 592 (3d Cir. 1980) and Raemar v. Smith, 555 F.2d 1362 (9th Cir. 1976).

The Courts are apperently unwilling to infringe in any way upon the trustees' broad area of discretion. Therefore, the employers must turn to the Congress of the United States for relief.

NAWGA supports, in addition to S. 1748, the enactment of legislation which would restrain the presently unlimited discretion of trustees by injecting employer interests into the decision-making process. This could be accomplished by allowing trustees to set benefit levels to promote the interests of employees "after consultation with the employer or his representatives and within reasonable bounds considering the employers' contributory obligations." The exact language of such a provision would, of course, be a matter for Congressional decision. Congress could also make the employer-appointed trustee responsible for representing the employer's interests. The essential aspect of the relief proposed is the injection of employer interests into the trustees' benefit-setting process in order to keep benefits at manageable levels.

Congress could also impose specific criteria, including the financial viability of the employer, to be considered by the trustees pursuant to their benefit-setting capacities. These standards would narrow the virtually limitless discretion of the trustees and make them accountable for their actions. In addition, with specific standards to which trustees would need to adhere, broader judicial review of trustee actions would be possible. Employers not satisfied with trustee decisions could then obtain genuine and satisfactory judicial review in the federal courts.

Once again, the exact nature of relief in this area is left to legislative initiative. However, NAWGA again urges this Subcommittee and the entire Congress of the United States to implement legislation which will prevent trustees from unfairly setting benefit levels far in excess of what employers' contributory obligations would dictate and provide employers with a legitimate means of challenge when they question pension plan trustee actions.

CONCLUSION

The Amendments Act's withdrawal liability provisions place an undue burden upon employers contributing to multiemployer pension plans. The MPPAA, which seeks to preserve and enforce the status quo, clashes with the Motor Carrier Act of 1980 which promotes innovation and new approaches to changing economic circumstances. The Amendments Act essentially imposes a penalty on businesses contributing to multiemployer plans which attempt to implement various available options in response to economic necessity.

Withdrawal liability assessments are often staggeringly high due to the trustees' establishment of benefit levels far in excess of the employers' negotiated contributory obligations. Thus, the MPPAA has led to financially crippling liability assessments beyond the net worth of the companies involved. It has imposed on the employer a forfeiture of property without compensation, regard to his interests, or a fair and impartial opportunity to be heard.

In fact, the MPPAA could ultimately cause severe harm to multiemployer pension plans. Withdrawal liability assessments which financially devastate participating employers will leave multiemployer plans with unsound financial bases. Moreover, employers have an overwhelming incentive to refrain from joining multiemployer plans. The infusion of "fresh blood" in the form of contributions from new participants will eventually cease, and this could be destructive to multiemployer plans in general.

The results will be harmful to all parties involved. Employers will lose substantial portions of their net worth. Employees will lose benefits from bankrupt pension plans. The labor benefit system will lose money and credibility. In this situation, nobody really gains.

NAWGA strongly supports S. 1748 as a first step toward needed change. The bill would help NAWGA members and other employers by exempting from the MPPAA's withdrawal liability provisions those plans pursuant to which employers negotiated contribution levels only.

NAWGA also supports the enactment of additional or alternative legislative relief. First, NAWGA suggests a change in the trucking industry exemption in order to increase the scope of its applicability to conform with the realities of the industry. NAWGA also supports Congressional constraints upon the freedom of benefit plan trustees to set pension levels at their discretion without any regard for the interests of the employer.

The current flood of litigation concerning withdrawal liability strongly suggests the need for change in this area. NAWGA urges Congress to take the necessary legislative initiatives to provide consistent, universal relief from the problems herein described.

Senator NICKLES. Mr. Fordham?

Mr. FORDHAM. Mr. Chairman, I would first like to be witness to answer some of your questions, and then to describe some particular singular facts of my client and then, if there is time, maybe more.

You asked a question and addressed it in your written statement about the willingness to sign new multiemployer collective bargaining agreements. I happen to be the first outside lawyer to testify. I also happen to have 28 years of experience as what I would describe as a part-time labor lawyer. My firm has numerous clients throughout New England. Indeed, I represent six plants in Senator Cohen's home State, and was particularly pleased to see him here.

There is absolutely no question in my mind that this problem will be an arguing point in every union organizational campaign against any union that has a multiemployer plan. I know that it has been successful in at least one instance to date, and I will bet a bottom dollar that it will be successful in numerous other instances. Even if the union wins an election, it is going to be a cold day in hell before any competent lawyer will allow any client to sign in on a multiemployer pension plan.

There is no question that you cannot afford to allow your client to be in that situation, so you will do absolutely everything you can to help keep it out of that situation. So there are substantial damages on the union/employee side as well as on the employer side. I guess I might say, "over my dead body," but I am hesitant to do that in this industry that I represent.

Also, you have repeatedly asked questions about information. The fact of the matter is that the union has the information, but we cannot get it. We have asked, even in the context of the litigation, numerous questions that we deemed relevant of the pension plan, which would have enabled me, on behalf of this company, to answer some of your questions, but they refused to give it to us. If we have to pursue the litigation, we will get it by discovery.

Now, the singular facts pertaining to this company are that it has been in business since 1918. It has been in collective bargaining relationship with the same union continuously from the early thirties forward until the termination liability was invoked.

Indeed, we dug out, and I have here, some of the old contracts, but you cannot find contracts going back to the 1930's. We have been a participant in the New England Teamsters Pension Plan since approximately 1960.

Maybe other people are in the same situation, but we in fact have three contracts that are really violated by the imposition of this plan. We have our basic collective bargaining agreement; we also have our pension plan indenture and agreement, which explicitly says that the sole and exclusive liability is the contribution that you are supposed to make before this other obligation popped out of the ground in 1980; and we also fully complied with all our obligations under the labor laws in negotiating with the union a termination agreement, which contains a general release of all claims and says that what we do is in full settlement of any and all claims whatever arising out of, or related to, or connected with, et cetera, the particular situation that triggered the liability in our case. And yet, despite having released us from all claims, a different legal entity, the New England Teamsters Pension Fund, comes after us, while we have been paying all the money to the teamsters, who carries it over to the pension plan, and in fact, all of our dealings with the pension plan over 20 years have been with the Teamsters' business agent locally as a kind of intermediary.

From here on out, Senator, my testimony in a very serious and ominous situation endeavors to introduce a touch of levity. It takes the form of a hypothetical conversation, about 2 minutes' worth, between a hypothetical union president, named Jimmy, and a hypothetical company president named Charlie. Any resemblance between actors living and dead is purely coincidental.

It starts out with Charlie: "Hi, Jimmy. Good to see you. What can I do for you?"

"Well, I've got this problem. Maybe you can help me out."

"What's that?"

"Well, you know, our multiemployer pension plan. We are short $15 million."

"What is the problem?"

"I am not sure. Between us, maybe we have been living too high off the hog—you know, too many managers, paying them too much for too little work, too much overhead."

"Is that the only problem?"

"Gee, not really. We made some loans to some of our friends, and things are tough; they cannot pay them back."

"Is that it?"

"No, not really. We have made some bum investments, and the market stinks. Also, our actuaries made some mistakes and set the benefits too high for the contributions we have been getting."

"Hey, why don't you change the benefits if they are too high?"

"Because the members would string us up by the thumbs."

"Oh, I guess I see the point. Well, how can I help you?"

"Well, I was hoping you would give me a million and a half. Maybe I can get all the companies to do the same, and we will be OK. It is tax-deductible, you know."

"Gee, Jimmy, I do not see how I can do that. My stockholders would have my head. Things are not too good anyhow, and besides, Jimmy, we have a contract. In fact, we have had 10 of them over 30 years. We have already given you $4.5 million under the contracts. Gee, Jimmy, I would like to help, but you know, we cannot increase the price of the stuff we have sold, and I do not see how we can pay more to the pension fund than our contract says. I am really sorry, I would like to help you out."

"Wait a minute. I know how we can do it. Suppose we stick it to the companies who leave the plan. Your company will not be hurt, Charlie, because you will never leave. We will let the companies who leave make up the shortfall."

"But Jimmy, what about their contracts with the pension fund? They have the same contracts as we do. How can you make them pay more than what their contract says?"

"I will go to Congress."

"Gee, would they change the contracts retroactively and make companies pay more than their contracts provide?"

"There is no harm in asking. You never can tell."

"Good Lord, Jimmy. Would a Senator or Congressman vote for such a thing?"

"We have got some legislative people up there who can bury this thing in a maze of complex ERISA stuff that no one will understand."

"But someday, it will all come out, when the companies who leave the plan find out what happened to them."

"Well, we will cross that bridge when we come to it. Besides, that is their problem."

"It sounds to me like the lawyers will have a field day."

"Don't they always?"

Senator **Nickles**. Mr. Fordham, thank you very much for that.

[The prepared statement of Mr. Fordham follows:]

BEFORE THE UNITED STATES SENATE
COMMITTEE ON LABOR AND HUMAN RESOURCES
SUBCOMMITTEE ON LABOR

TESTIMONY OF C&S WHOLESALE GROCERS, INC.
BY LAURENCE S. FORDHAM, ESQUIRE
ON S. 1748, THE MULITEMPLOYER PENSION PLAN STABILIZATION ACT

Mr. Chairman, I am Laurence Fordham, and I represent C&S Wholesale Grocers, a small family business in the State of Vermont. Lester Cohen, the President of C&S Wholesale Grocers, is sitting beside me. I very much appreciate the opportunity to testify about the terrible impact of the 1980 ERISA amendments on small employers nationwide, and on C&S Wholesale Grocers in particular.

C&S is a grocery wholesaler; it sells, warehouses and delivers groceries to retail firms and military commissaries in New England. Mr. Cohen's father founded C&S in 1917, and Mr. Cohen has been President since 1958. His two sons, Rick and Jim, also work in the business, with Rick managing daily operations and Jim in charge of employee relations.

In 1980 the Cohens moved C&S from its earlier location in Worcester, Massachusetts to Brattleboro, Vermont. Escalating costs had made C&S' success depend on increased volume, but they were unable to find a larger facility in Worcester or to finance the construction of a new one. The State of Vermont and the City of Brattleboro offered C&S incentives and assistance in relocating, and construction of a new warehousing facility was made possible through the cooperation of the Vermont Industrial Development Authority and the Federal Farmers Home Administration.

Before closing the Worcester facility and making the move to Vermont, C&S engaged in lengthy bargaining over the move with the Worcester County Teamsters local, which then represented C&S' warehousemen and drivers. The Teamsters threatened a strike in Worcester and further labor trouble in Vermont that could have ruined C&S' business. To prevent this disastrous possibility, to terminate peacefully the collective bargaining relationship with the Worcester local, and to assist the employees who did not follow the company to Vermont, C&S entered into a very generous "Termination Agreement" with the Teamsters. C&S agreed, among other things, to grant substantial severance pay and to make payments that would extend employees' coverage for Teamsters health and welfare benefits beyond the period of their employment.

The cost to C&S of this generous settlement was over a quarter of a million dollars. As a small company, C&S simply did not have that great an amount of cash on hand, and despite the protests of the Union, C&S had no choice but to insist on making the severance payments in installments over several months. In return for all of C&S' undertakings, the Teamsters agreed to release C&S from "any and all claims whatsoever arising out of, related to, or connected with, the closing of C&S' facility in Worcester, and the opening of its facility in Brattleboro."

Nevertheless, five months later a demand letter arrived informing C&S that it had withdrawn from the New England Teamsters and Trucking Industry Pension Fund, and was liable to the Fund for over $1.1 million in "withdrawal liability," to be paid in monthly installments totalling $165,000 per year for the next ten years. It appears that C&S could not have escaped withdrawing from the Fund. If C&S had continued its operations in Worcester it would have gone out of business, resulting in withdrawal, and when it moved to survive, that also constituted a withdrawal -- a classic Catch-22. Yet it is such an involuntary "withdrawal" that triggers liability under the 1980 amendments to ERISA.

C&S had faithfully made contributions to the New England Teamsters Fund for nearly twenty years, relying on the express written promise of the Fund that the only financial obligation of contributors was to make weekly contributions at a rate set in collective bargaining during the period of their membership. Now C&S was told that the 1980 Amendments to ERISA had undone the agreement and retroactively imposed a cost enormously larger than what C&S had bargained for.

The $1.1 million liability claimed by the Fund is roughly equal to the entire net worth of C&S Wholesale Grocers. Sixty-five years of work by the Cohen family have expanded the business to a size just large enough for the Teamsters Fund to swallow. Aside from the liability payments themselves, the mere knowledge of the Teamsters Fund's gargantuan claim threatens C&S' ability to obtain the credit on which a wholesale business depends. The employment that C&S is providing in the depressed Brattleboro area, and the other economic benefits that encouraged Vermont to smooth the path for C&S' move, may be completely eliminated because the withdrawal liability triggered by that move may destroy C&S altogether.

I will leave the more detailed comments on the 1980 legislation to my written submission, but in closing let me stress two key points. First, C&S, like so many other employers, was promised that its only obligation to the union pension fund would be to make current contributions. While C&S was a contributing member, it helped carry the burden for past members, and C&S was entitled to rely on the promise that if it ever left the Fund, the burden would shift to future members. Second, our economy and our society cannot afford a system of pension liability which tells an employer that the only way to avoid an unanticipated and overwhelming liability is to cut his losses by going out of business. Thank you.

FURTHER COMMENTS CONCERNING THE WITHDRAWAL LIABILITY PROVISIONS

1. The Nature of the Withdrawal Liability Provisions

The typical multiemployer pension plan is a pooled trust fund to which numerous employers organized by an affiliated group of local unions contribute. The collective bargaining agreements between the employers and the locals prescribe a fixed rate of contribution; ordinarily this is an hourly rate, whereby the employers make weekly or monthly contributions to the fund based on the number of man-hours worked under the agreements. Making these contributions is the one and only obligation to the fund that the employer undertakes; he is not responsible for guaranteeing ultimate payment of pension benefits, and the governing documents of the trust fund normally include an express statement that the employer's financial obligation is limited to payment of the collectively bargained contributions. The actual setting of pension benefit levels is a responsibility reserved to the sole discretion of the fund's trustees. The contributing employers themselves are not permitted to participate in these decisions. The trustees' setting of benefits is a function entirely separate from the collective bargaining between the employers and the local unions in which contribution levels are set. When the fund trustees adjust benefit levels, they must rely on past experience as to the contribution rates negotiated and the fund's accumulated assets, and on informed projections of the probable future contributions.

This freely bargained pension trust system has many advantages for both the employers and their employees. Because there are numerous contributing employers, the risk that an employer's business troubles will affect his employees' pension rights is greatly decreased. At the same time, the employers know that the economic risk arising from the possible misfortunes of other contributors is limited to the level of contributions set in free collective bargaining. Of course, the success of the system depends on the prudence and integrity of the fund's trustees, who must keep benefit levels within a range that the fund's contribution income can support, although the trustees themselves do not control those contribution levels.

Congress has intervened in this voluntary arrangement twice with ERISA. First, in 1974, it empowered the Pension Benefit Guaranty Corporation (or PBGC), a new government agency founded for the purpose of insuring pension plans against failure, to guarantee a basic level of pension benefits to beneficiaries of multiemployer pension plans that had terminated with insufficient funding. If the PBGC chose to make these payments, it was permitted to seek reimbursement from all employers who had been contributors to the plan within the five years preceding its collapse.[1/] An employer's liability only arose in case of actual termination of the pension plan, and could never exceed thirty percent of the employer's net worth.[2/]

In 1980 Congress took the extraordinary step of imposing on any employer who for any reason ceased contributing to a multiemployer plan a liability to make up part of the difference between the fund's current asset level and the present value of the benefits already promised to employees by the trustees. This exaction, known as "withdrawal liability," is levied regardless of whether the employer leaves the pension plan voluntarily or involuntarily, regardless of the actual causes of the plan's current underfundedness, and regardless of the plan's long-term financial health. There are a variety of formulas that a plan may use to calculate the withdrawing employer's liability,[3/] but all of them make the employer shoulder the burden of pension costs for employees who have never worked for him, and all of them create a liability that flatly contradicts the freely bargained basis of the employer's participation in the plan by extending the employer's obligation far beyond the contributions he agreed to make.

2. The Impact of the Withdrawal Liability Provisions

The new 1980 liability rules are calamitous, not only for employers who withdraw from pension plans and incur these heavy obligations, and for employers who are coerced by the threat of withdrawal liability into continuing their participation, but ironically also for the pension plans themselves and the labor unions that sponsor them. The public outcry is coming from all directions as employers, unions and plan trustees are rudely awakened to the full significance of the 1980 amendments.

The very aspect of multiemployer plans that makes them so attractive when the employer's obligations are limited to contributions, the pooling of contributions and benefits over a large group of employers, allows the plans to mount up so great a combined paper deficit that a small employer's assigned share can dwarf his total net worth. That is why the provision limiting an employer's liability to his bargained-for contributions is such an essential element of his agreement to join a multiemployer plan. Congress' disregard of the employer's justified reliance on these limitation provisions wholly vitiates employers' attempts to adopt rational pension and compensation policies within their means and, as a corollary, pricing policies for their products which are realistically related to known and anticipated costs. The retroactive destruction of these contractual protections is a major focus of the widespread and ever-increasing litigation that challenges the constitutionality of the 1980 ERISA amendments.

Since the statute now contains no ceiling on the withdrawal liability of an employer who attempts to remain in business, even if it exceeds his net worth, the statute will force many small businesses who withdraw from pension plans into insolvency or even bankruptcy or liquidation.[4] This in itself is a disastrous result in a sluggish economy like the present one, but the threat of withdrawal liability constitutes a discouraging cloud hanging over every member of a multiemployer fund, because the events that trigger the liability need not be voluntary acts of the employer at all. For example, if his employees vote out their present union, the employer is deemed to have withdrawn from that union's pension fund, and liability will result. Or, if an employer is forced by business setbacks to reduce his operations, he may find himself guilty of a "partial withdrawal," requiring payment of a proportional share of the liability for a "complete withdrawal."[5] This crushing burden will no doubt finish off many small businesses that might otherwise have survived a difficult period.

For employers who are not forced into involuntary withdrawals, the threat of withdrawal liability distorts normal business decisions. An employer cannot afford to change his place of business, no matter how sound his reasons or how exigent his circumstances, if relocation would mean moving outside the geographic jurisdiction of the local pension fund he has joined. (Though some gigantic pension funds cover broad multistate areas, many more are limited to a state or an even smaller region.) Even relocation within the pension fund's jurisdiction is extremely perilous, for if it turns out that the employer's new work force does not want the old union, withdrawal liability will descend like a sledge hammer. A larger business' allocation of work among individual facilities is also impeded, for transfer of operations between different facilities not covered by the same pension plan also amounts to a partial withdrawal.[6/] Beneficial sales of stagnant or failing businesses are likewise stifled by the spectre of withdrawal liability. Firms that would otherwise purchase the assets of such businesses and take the risks of trying to revitalize them are unwilling to assume the monstrous cost of the seller's withdrawal liability if their efforts at revitalization fail.[7/] And a seller is forced to price himself out of the market if he must swallow a withdrawal liability that can easily exceed the fair market value of his assets. A troubled economy with declining productivity can ill afford these irrational constraints on efficient management and healthy business decisions.

Not only does potential withdrawal liability threaten the continued existence of otherwise viable business, frustrate planning, and derail salutary business decisions, but it also encourages conduct abjured by federal labor policy. The fundamental premise of this policy is that employees' decisions as to which union, if any, shall represent them must be free from any coercion or interference. Nevertheless, the calamitous economic consequences of withdrawal liability give an employer a powerful, if not irresistible, incentive to assure that his employees do not decertify their union or install a new one. Similarly, an employer who has relocated is driven to foist the old union on his new employees in order to escape withdrawal liability. Thus, inexorably the withdrawal liability scheme thwarts federal labor policy.

Now that employers have recognized the tremendous burdens imposed by the withdrawal liability provisions of ERISA, potential new contributors, many of whom are shops newly organized by the unions, are avoiding participation in multiemployer pension plans like the plague. Indeed, few rational employers would willingly join such a plan, since it is far more advantageous to meet their employees' retirement needs by, for example, funding individual I.R.A. accounts. The 1980 amendments have thus inflicted a severe blow on their intended beneficiaries, the pension funds themselves. Voluntary expansion of a pension fund's contribution base to meet future funding needs is obstructed by employers' apprehension of the grave dangers of membership in a multiemployer fund. The employer's economically dictated unwillingness to join multiemployer funds correspondingly harms the unions that sponsor those funds. Long used by unions to attract new members, the pension funds lose their organizing utility when employers will have nothing to do with them. Furthermore, the threat of potential withdrawal liability hampers the unions' efforts in collective bargaining with contributing employers, because these employers are driven to hold back in their economic offers in order to save money that may be needed to pay off withdrawal liability. The funds and the unions themselves have perceived that withdrawal liability ironically injures their prospects: that is why a midwestern local Teamsters fund and a Teamsters local union have joined employers as plaintiffs in a suit challenging the constitutionality of the 1980 amendments.[8] Thus the practical effect of withdrawal liability is to frustrate one of the major goals of the 1980 amendments, encouragement of the maintenance and growth of multiemployer pension plans.

3. The Windfall Benefits of Withdrawal Liability

The major effect of withdrawal liability on the future prospects of a multiemployer pension fund is to drive away potential new members. In addition, rather than providing the intended benefit for participating employees, the enormous transfers of money from withdrawing employers to the fund's coffers often confers a windfall on the employers who remain in the fund, and on delinquent trustees whose past irresponsible or even dishonest administration of the fund is rendered harmless because their depletions of the fund's assets are charged to withdrawing employers.

Withdrawal liability is in no way limited to bailing out financially distressed pension funds: the statute applies to all plans that are currently underfunded on paper, based on highly conservative actuarial predictions of future performance and completely irrespective of the plan's potential for increased contribution income. The actual financial health of the plan is totally irrelevant to the imposition of liability.

Similarly, the predominant statutory formula for computing liability does not even purport to relate the amount exacted from the withdrawing employer to any underfunded obligation of the plan to the employer's own employees.[9] The withdrawing employer's past contributions may be more than adequate to finance benefits for his own employees, but he will still be held responsible for a share of the paper deficit caused by others. The withdrawing employer is forced to subsidize benefits to employees of contributors who withdrew before April 29, 1980, and to employees of current contributors who may be far more capable of supplying the funds needed for their own employees in future years. These remaining contributors, many of whom are large, financially stable corporations, are major beneficiaries of the liability imposed on the weaker withdrawing employers.

The receipt of withdrawal liability payments may also be particularly welcome to fund trustees who have depleted fund assets through breaches of fiduciary duty ranging from imprudent management and irresponsible grants of benefits to outright peculation. The abuses rampant in some multiemployer funds were a notorious stimulus to the passage of ERISA in 1974, and continuing government litigation against certain funds suggests that the problem has not disappeared. Trustees who have misused plan assets for their own benefit, incurred unjustifiable "administrative costs" for luxuries, or diverted fund investments into questionable channels will rejoice that the gaps they have created in pension funding are being filled at the expense of departing employers. This shifting of the monetary burden for trustee mismanagement severely undercuts the fiduciary duty provisions of ERISA, for it removes the major financial incentive for union members to challenge their trustees' misconduct.

4. Other Defects of the Statute Compound the Injury.

The crushing burden of liability imposed by the 1980 amendments is further aggravated by an arbitrary system of special rules and by a procedural mechanism for enforcing the liability that discards rules of procedural fairness fundamental to our legal system.

Even the basic liability rules are subject to exemptions for a few favored industries, including special construction and entertainment provisions and a wholly arbitrary provision establishing a separate scheme of liability for a few plans concentrated in trucking and related industries.[10] In contrast, other portions of the statute favor pension plans at the expense of withdrawing employers in the seagoing and retail foods industries.[11] This capricious distribution of favors, partly concealed by the complexities of the 1980 amendments, is especially inequitable in a statute that places such a heavy burden on others.

The procedural framework is an unprecedented sacrifice of the employer's constitutional rights to the interests of the pension plan. The plan is entitled to adjudicate its own liability claim, and the plan's determination is insulated from careful scrutiny thereafter by a series of arbitrary presumptions in its favor.[12] The employer's rights to jury trial and access to the courts are simply ignored, and he is compelled to submit any dispute to binding arbitration where the arbitrator's freedom to depart from judicial norms serves as a shield to rubberstamping the plan's determination.[13] These independent constitutional infirmities emphasize the 1980 amendments' unfathomable disregard for considerations of fairness and the rights of the withdrawing employer, and form another major focus of the burgeoning litigation challenging the amendments.

5. The Legislative Solution

Finding intolerable the devastation that the misguided withdrawal liability provisions have been inflicting on employers, pension plans, and labor unions, an increasing proportion of the political and business communities has called for the correction of the most offensive provisions of the 1980 amendments before they wreak more havoc. Senator Hatch has introduced a bill for that purpose, which is premised on a fair and realistic view of the collective bargaining process in the multiemployer context.14/

Senator Hatch's bill, S. 1748, and its House counterpart, H.R. 5223, recognize that a pension plan in which the employer agrees to make only a certain level of contributions, and in which the fund trustees retain full control over the benefit levels, does not involve a promise from the employer to his employees of any particular level of benefits. It should accordingly not be treated as a "defined benefit" plan subject to the withdrawal liability provisions, but rather as the kind of pension fund it actually is -- a "fixed contribution" plan, to which withdrawal liability rules cannot reasonably or justly be applied.

Senator Hatch's bill deserves the fullest consideration and support. It answers the economic and constitutional objections to ERISA as it now stands by returning the funds, their union sponsors, and their contributors to the situation they bargained for. Where employers have promised only a level of current contributions, the limits of their undertaking will be respected. Once contributors' obligations to multiemployer pension plans are defined by the responsibilities they have voluntarily undertaken, pension plans can be kept financially sound without frightening away new participants or doing violence to the rights of employers or to the economy as a whole.

6. SUMMARY

The 1980 amendments to ERISA imposed an unanticipated and massive liability on employers who had been lured into multiemployer pension plans on the promise that their only financial obligation would be to make current contributions. The principal destructive consequences of this extraordinary legislation include the following:

- the crushing burden placed on withdrawing employers who had every right to rely on the terms of their agreements with the pension funds;
- the loss of jobs and services when businesses are driven into liquidation by withdrawal liability;
- severe distortion of rational management and transfers of ownership;
- application of strong pressures on an employer to force his employees involuntarily to retain their incumbent union, in conflict with federal labor policy;
- total discouragement of new membership in multiemployer pension plans to the detriment of both the plans and their sponsoring unions;
- no relation whatsoever between withdrawal liability and needs of the employer's own employees or actual distress of the pension fund;
- windfall benefit to dishonest or negligent trustees of funds;

- complete disregard of fairness to the employer or fidelity to the Constitution in procedures for enforcing liability.

S. 1748 and H.R. 5223 afford an opportunity to redress these harms of the ill-conceived 1980 amendments, and deserve the fullest consideration and support.

FOOTNOTES

1/ See 29 U.S.C. § 1364 (1976) (now amended).

2/ See 29 U.S.C. § 1364(b) (1976) (now amended).

3/ See 29 U.S.C.A. § 1391 (1980)

4/ The only ceiling for multiemployer plans is the one in 29 U.S.C.A. § 1405 (1980), concerning insolvent employers and sales of assets to unrelated parties.

5/ See 29 U.S.C.A. § 1385 (1980).

6/ See id.

7/ See 29 U.S.C.A. §§ 1384, 1405 (1980).

8/ Peick, et al. v. Pension Benefit Guaranty Corp., No. 81 C 1911 (N.D. Ill.).

9/ See 29 U.S.C.A. § 1391(b) (1980).

10/ See 29 U.S.C.A. § 1383(b),(c),(d) (1980).

11/ See 29 U.S.C.A. § 1385(c) (1980); Pub.L. No. 96-364, § 108(c)(4) (not codified).

12/ See 29 U.S.C.A. §§ 1399(b)(2)(B), 1401(a)(3),(c) (1980).

13/ See 29 U.S.C.A. § 1401(a),(b)(3),(c) (1980).

14/ See 127 Cong. Rec. S11,629-30 (daily ed. Oct. 19, 1981).

Senator **Nickles**. Mr. LaCrosse?

Mr. **LaCrosse**. Thank you, Mr. Chairman.

My name is James LaCrosse, and I am president of National Liquor Corp., in Indianapolis, Ind. I appear here today first as an individual businessman, a wholesaler distributor, with a serious withdrawal liability problem.

Second, I am here today as a member of the Wine & Spirits Wholesalers of America, which is affiliated with the National Association of Wholesaler-Distributors, a federation of 123 national wholesale distribution trade associations, and 45,000 firms throughout the country.

I am here to testify for this industry, in favor of Senate bill 1748 because of the outrageous position we have been placed in by the withdrawal liability provisions of MPPAA.

On May 1, 1981, I received a letter from the Central States' Pension Fund informing me that I owed the fund $443,000 for withdrawal liability which, with interest, is approximately 50 percent of the net worth of my company.

In 1973, I purchased the company and assumed the existing Teamster agreement, including the pension provisions. In 1973, I negotiated a renewal of that agreement and asked about the benefit levels of the fund. I was told then that it made no difference, since we were only negotiating contribution levels and the fund has always set the benefit levels.

There has never been any direct, indirect or implied responsibility of the company to guarantee such benefit levels until October 1980. However, by that time, our contract had already expired, and because of a disagreement over Teamster insistence on areawide grievance procedure, the union went out on strike, which was extremely violent. Employees and their families received threats of violence, were assaulted, were followed home, and there were many incidents of property damage to cars and homes, and several shootings occurred.

In October of 1980, a bomb blew out part of our building and came very close to killing two bystanders.

Finally, 20 striking employees who were Teamsters members resigned from the union and crossed the picket lines, and the violence came to an end.

By this time, our employees were opposed to my signing any contract with the union. If I had wanted to sell out the interests of my employees, I could have signed a contract which also would have eliminated any withdrawal liability.

I did not take this path to force a Teamster contract on our employees. Instead, I left it up to the employees to decide what they wanted to do. They decertified the union and voted 64 to 25.

As a result of their unilateral decision, I was placed in the disastrous financial position of being assessed $443,000, which, with interest, could well exceed $500,000.

I had no control over any of the factors which led to my current problem. First, I had no control over the fund's decision, which resulted in an unfunded liability of more than $3.5 million.

Second, I had no control over the Teamsters' decision to determine the employer contribution levels.

Third, I had no control over my employees' decision to decertify the Teamster local.

Finally, I had imposed upon me, by the passage of MEPPAA, additional commitments for which I had never bargained.

What is equally upsetting to me is that even though the fund is seeking approximately another $500,000 from me, this money would not be used for the benefit of all my employees, who are now covered by our own pension program, that has higher benefits. Of the employees that have been withdrawn from the fund, only 21 of 109 had any vested interest, with 4 who would eventually receive only $400 per month, while 17 others would receive a maximum of only $175 per month under their plan.

I asked our actuaries to determine how much we would have to put into a pension program today to cover these vested benefits, which they calculated to be $188,000 at the PBGC rate, which compares to the $500,000 that the fund was seeking from us.

To show how ridiculous the law is, let us assume that we were a new company that had joined the plan 5 years ago. Under that assumption, we would have paid over $250,000 in contributions, plus the assessment of $500,000, for a total of $750,000 and, since we had only been in the plan 5 years, not one employee would have been vested, and the Central States Fund would have no liability to any of our employees.

I respectfully submit that the current law, rather than protecting pension plans and employees, has caused gross inequities upon businessmen such as myself and my fellow members of WSWA and NAW.

If Senate bill 1748 were enacted, these inequities and the legal issues raised by MEPPAA would disappear.

I am particularly grateful to Senator Quayle for his cosponsorship of 1748 and his efforts on my behalf.

Thank you very much.

Senator NICKLES. Thank you very much, Mr. LaCrosse.

[The prepared statement of Mr. LaCrosse follows:]

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS

STATEMENT OF

Testimony of James LaCrosse
on Behalf of the
Wine & Spirits Wholesalers
of America
&
the National Association
of Wholesaler-Distributors

BEFORE THE

Labor Subcommittee
of the

Committee on Labor & Human Resources

United States Senate

ON

Withdrawal Liability:

A Growing Problem Within
Wholesale Distribution

March 11, 1982

1725 K Street, N.W. • Washington, D.C. 20006 • 202/872-0885

My name is James LaCrosse and I am President of National Liquor Corporation, Indianapolis, Indiana.

I appear here today in a dual capacity. First and foremost as an individual businessman -- a wholesaler-distributor -- with a serious withdrawal liability problem resulting from enactment of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA).

Second, I am here today as a member of the Wine & Spirits Wholesalers of America (WSWA) which is affiliated with the National Association of Wholesaler-Distributors (NAW).

Both WSWA and NAW are deeply concerned about MPPAA and the detrimental impact of withdrawal liability on this industry. Moreover, both Associations strongly support the concept of S 1748 on equity grounds. Labor Committee Chairman Hatch is to be commended for this initiative to limit employer liability to agreed upon contribution levels. We also want to thank this Subcommittee and its Chairman for holding these important hearings.

Hopefully, remedial steps will be taken soon to alleviate this disastrous problem.

The Wine and Spirits Wholesalers of America, Incorporated (WSWA) is a national trade association founded in 1943 and dedicated to advancing the interests and independence of wine and spirits wholesale distribution in the United States.

Currently the Association acts as the voice of the 15 billion dollar wholesale branch of the wine and spirits industry. WSWA represents over 800 firms and franchises in 42 states; the District of Columbia; Puerto Rico and the Virgin Islands. The industry is heavily labor intensified and many of its members have collective bargaining agreements requiring contributions to multiemployer pension funds. The existing legislation, MPPAA, as well as S 1748, have a direct economic impact on WSWA members which is highlighted by my situation.

Let also me provide some background on NAW and the wholesale distribution industry.

NAW is the national voice of wholesale distribution. The Association is comprised of 123 national wholesaler-distributor trade associations (see Appendix A), with a collective membership of 45,000 firms nationwide. The Association's members are responsible for the dissemination of most goods throughout our economy. There are over 300,000 wholesale distribution locations throughout the country which employ approximately 5.4 million people in stable high-paying jobs.

Our industry, by virtue of its function, conducts extensive warehousing and trucking operations. NAW is in the process of surveying the member associations to determine industry exposure to this new law. The Association will be most happy to transmit the results of its survey findings on the extent of withdrawal liability in wholesale distribution as soon as they are known.

NAW has received countless member communicatiions, as has WSWA, detailing withdrawal liability problems. These withdrawal assessments have ranged anywhere from $7,000 to over $1 million.

Our Associations have no easy answers for our members on how or when this problem will be resolved. Most firms within the industry are closely-held, family-run businesses, have been in existence for decades, and have excellent relations with their employees. Many of these companies have had the same personnel for many years.

This law is creating tensions for these employees. MPPAA has brought about circumstances where neither wholesale distribution industry executives nor their employees can control events which may trigger withdrawal liability.

I am here to testify in favor of S 1748 because of the outrageous position I have been placed in by the withdrawal liability provisions of MPPAA. I feel it is my duty, as a small businessman, to speak out on behalf of myself and other wholesaler-distributors who are unwittingly caught in this predicament. In my case, on May 1, 1981, I received a brief letter from the Central States Pension Fund (see Appendix B) informing me that I owed the fund $443,396.97 for withdrawal liability which, with interest, is approximately 50% of the net worth of my company. Now I understand what is meant by suffering from the pains of withdrawal. Let me tell you how and why I found myself in this predicament.

In 1973, I purchased the company and assumed the existing collective bargaining Teamster agreement, which had been negotiated by predecessor. My company employs 109 employees in the categories of drivers and warehousemen, which were covered by this agreement. This agreement contained, inter alia., a provision requiring contributions of approximately $10.00 per week per employee into the Central States Pension Fund. In 1974, I negotiated a renewal of the agreement. At that negotiation, I asked about the benefit levels of the fund and was told the information was not available, but that it made no difference since we were only negotiating contribution levels. In subsequent negotiations it has always been the same, the company and the union always have set the contribution levels and the union and the Central States Fund always have set the benefits levels.

There never has been any direct, indirect or implied responsibility of the company to guarantee such benefit levels until October 1980.

At that time, I received a bulletin from the pension fund, which indicated that contributing employers would be liable for the "Assessment of Continuing Liability" if a withdrawal took place after April 28, 1980. However, our contract already had expired on May 1, 1980. We had been bargaining for a new agreement and the only major issue that remained open concerned a grievance procedure. Although not important to my employees, it was understood that the Teamsters would not let any company pull out of their so-called "Joint Grievance Committee" without a strike. This "Committee" serviced area-wide contracts and we preferred a grievance procedure that was limited to the Local Teamster Union and our company.

The union decided to strike, but before any picket lines were established, five of our trucks which were parked outside our facility were mysteriously destroyed. From this point, things went from bad to worse. Employees, especially the replacements and guards, as well as their families, received numerous threats of violence; some were assaulted, many were followed home; there were many incidents of property damage to cars and homes and rifles and wrist rockets were used to shoot at the guards. Finally, in October 1980 a bomb was placed on the side of our building, blowing out part of the wall and coming very close to killing two people walking down the street. About seven weeks later, 20 striking employees who were Teamster members, resigned from the union and crossed the picket line. Shortly thereafter, the violence came to an end.

However, by this time, our active employees (including 25 former Teamster members) were opposed to National Liquor signing any contract that forced them to join the union. Since the union only allows "dues-paying members" to vote, and in our situation there were only nine dues-paying members out of 109 employees, it would have been simple for our company to accept a "Union Shop Contract" and offer it to the nine men for ratification; thereby, forcing the other 100 employees to join the union. If I had wanted to sell out the interests of my employees, I could have taken this simple course, which also would have eliminated the risk of incurring some unspecified "assessment" of withdrawal liablity.

I did not take this path and force a Teamster contract on our employees. Instead, I left it up to the employees to decide what they wanted to do. They filed a petition with the National Labor Relations Board to decertify the union which resulted in a vote of 64 to 25 to decertify. As a result of the employees' unilateral decision NOT to be represented by their union, I was placed in the disastrous financial position of being assessed $443,000. which, with interest, could well exceed $500,000.00. It must be remembered that although my percentage of unfunded liability was .000124 (see Appendix B), this infinitesimal percentage translated into a half-million dollar liability.

The most frustrating part of this entire scenario is that I had no control over any of the factors which led to my current problem. Thus, as I stated before, the fund's trustees made all the decisions on the benefit levels and where employer contributions would be invested -- which resulted in an unfunded liability of $3,575,782,000 (See Appendix B).

As a businessman, I take the risk and responsibility for losses that may arise from my management decisions. It is unjust to make me financially responsible for the gross mismanagement of persons I have no control over, such as the trustees.

Further, I have no control over the Teamsters' procedures whereby they determine the employer contribution levels that are needed by the fund. Indeed, I could not even lawfully continue to make contributions on behalf of the employees into the plan once they voted the union out.

Additionally, I had no control over my employees' decision to decertify the Teamster Local; unless, I violated the National Labor Relations Act, by attempting to deny my employees their right to determine whether or not they should continue to belong to the union. Even though I would not violate my employees' rights, I believe MPPAA gives the unions a financial hammer over employers who may be forced to attempt to deny the rights of their employees to decertify a union in order to avoid financial disaster.

Finally, I had imposed upon me, by passage of MPPAA, additional commitments above those I had bargained for. Thus, the contracting parties, the union and myself, intended that my only liability to the Central States Fund would be those contributions specified in our collective bargaining agreement. With one stroke, Congress amended this agreement and created a situation where my withdrawal liability exceeded my actual contributions by approximately a ratio of two to one.

What is equally upsetting to me is that even though I have paid a total of $258,438.00 over the past five years and the fund is seeking approximately another $500,000.00 from me, this money would not be used for the benefit of all my employees. Thus, only 21 of my employees had any vested benefits with the Central States Fund. Only four of these 21 employees were fully vested and they would eventually receive only $400.00 per month, while the other seventeen would receive a maximum of only $175.68 per month.

I asked our actuaries to determine how much we would have to put into a pension plan today to cover the vested benefits that are due our employees that have been withdrawn from Central States. They gave me three numbers based upon different earnings rates as follows:

*Estimated Fund to Cover Vested Benefits of Teamster Employees

Earnings Rate	Fund Required
5%	$298,000
6%	$258,376
PPGC Rates	$188,336

*Prepared by McCready and Keene, Inc.

We have been assessed $443,000.00 as of May 1, 1980 and may have to pay interest from that date which would bring the total well over $500,000.00. Yet the benefits these monies will provide would be no more than a fund with a realistic earnings rate at $188,336.00. This also assumes that we had paid nothing into the fund, whereas, in fact, just over the past five years, we have paid $258,438.00. This should have been more than enough to cover the vested persons, as well as, those few people who have retired.

To show how ridiculous the law is, let us use our situation as an example, but let us assume that we were a new company that had joined the plan five years ago. Under that assumption, we would have paid $258,000.00 in contributions, plus the assessment of $500,000.00 for a total of $758.000.00, and, since we had only been in the plan five years, not one employee would have been vested and the Central States Fund would have no liability to any of our employees.

I respectfully submit that the current state of the law, rather than protecting pension plans and employees as Congress intended, has to the contrary, caused gross inequities to be placed upon businessmen, such as myself and my fellow members of WSWA and NAW. These inequities have resulted in a proliferation of litigation that calls into question the legality of MPPAA. If S 1748 were enacted, these inequities and the legal issues raised by MPPAA would disappear.

Under the law prior to the enactment of MPPAA, an employer could withdraw from a multiemployer pension plan without further liability so long as the plan did not terminate within five years of the withdrawal without sufficient assets to provide benefits at levels guaranteed by the Pension Benefit Guaranty Corporation (PBGC). Once five years had passed, an employer had no further liability. Even during the five-year period, if a plan was terminated and if there were insufficient assets in the fund to provide benefits at levels guaranteed by the PBGC, each employer was liable only for a proportionate share of the PBGC's guaranteed benefits up to a maximum of 30 percent of the employer's net worth.

The legislative history of MPPAA indicates that Congress believed that the law prior to 1980 encouraged employers to withdraw from multiemployer pension plans if there were any indications that the plans were encountering or would in the future encounter financial problems. Congress was convinced evidently that employers in multiemployer pension plans could control by themselves whether they stayed in or withdrew from such plans. Congress realized that if too many employers withdraw from a particular multiemployer plan, the funding base of the plan would be reduced and the remaining employers might not have sufficient resources in order to pay off obligations to not only their own employees, but also those of withdrawing employers. In other words, there was a strong feeling that withdrawing employers should not be able to shed easily the liability for the pensions of their employees merely by withdrawing from a multiemployer pension plan.

In theory, the concerns of Congress were correct. However, Congress ignored the facts of life in many industries and in many collective bargaining situations where (1) employers have had little choice in determining whether they were required to contribute to multiemployer pension plans, (2) such employers have not been able usually to withdraw from such plans without making substantial changes in their businesses or by going out of business, (3) many employers believe that their only obligation to multiemployer plans was to make a defined contribution, and (4) that they were not responsible for establishing the benefit levels of such plans.

This situation in turn led to a number of challenges, both to the constitutionality of MPPAA and to the manner of its interpretation and enforcement.

The attached Synopsis of Legal Issues Surrounding MPPAA reviews the major constitutional and other issues associated with the 1980 law. Many of these issues are synonymous with my circumstance. The synopsis was prepared by Benjamin Goldman and Ron Tish of the law firm of Feldman, Krieger, Goldman & Tish, Washington, D. C. The firm serves as Employee and Labor Relations Counsel to WSWA.

In conclusion, I strongly support, as does WSWA and NAW, S 1748 and commend this Subcommittee for its efforts.

APPENDIX A

National Wholesaler-Distributor Organizations Affiliated with the National Association of Wholesaler-Distributors

Air-conditioning & Refrigeration Wholesalers
American Dental Trade Association
American Jewelry Distributors Association
American Machine Tool Distributors' Association
American Supply Association
American Surgical Trade Association
American Traffic Services Association
American Veterinary Distributors Association
Appliance Parts Distributors Association, Inc.
Associated Equipment Distributors
Association of Footwear Distributors
Association of Steel Distributors
Automotive Service Industry Association
Aviation Distributors & Manufacturers Association

Bearing Specialists Association
Beauty & Barber Supply Institute, Inc.
Bicycle Wholesale Distributors Association, Inc.
Biscuit & Cracker Distributors Association

Ceramic Tile Distributors Association
Ceramics Distributors of America
Coated Abrasives Fabricators Association
Cooperative Food Distributors of America
Copper & Brass Servicenter Association
Council for Periodical Distributors Association
Council of Wholesale-Distributors
  American Institute of Kitchen Dealers

Distributors Council, Inc.
Door & Hardware Institute
Drug Wholesalers Association

Electrical-Electronics Materials Distributors Assn.
Explosive Distributors Association, Inc.

Farm Equipment Wholesalers Association
Flat Glass Marketing Association
Fluid Power Distributors Association, Inc.
Food Industries Suppliers Association
Foodservice Equipment Distributors Association

General Merchandise Distributors Council

Hobby Industry Association of America

Independent Medical Distributors Association
The Irrigation Association
Institutional & Service Textile Distributors
  Association, Inc.
International Ceramic Association

Machinery Dealers National Association
Mass Merchandising Distributors Association
Material Handling Equipment Distribution Association
Monument Builders of North America-Wholesale Div.
Motorcycle Industry Council
Music Distributors Association

National-American Wholesale Grocers' Association
National Appliance Parts Suppliers Association
National Association of Aluminum Distributors
National Association of Chemical Distributors
National Association of Container Distributors
National Association of Decorative Fabric Distributors
National Association of Electrical Distributors
National Association of Fire Equipment Distributors
National Association of Floor Covering Distributors
National Association of Manufacturing Opticians
National Association of Marine Services, Inc.
National Association of Meat Purveyors
National Association of Plastics Distributors
National Association of Recording Merchandisers, Inc.
National Association of Service Merchandising
National Association of Sporting Goods Wholesalers
National Association of Textile & Apparel Distributors
National Association of Tobacco Distributors
National Association of Writing Instrument Distributors
National Beer Wholesalers Association
National Building Material Distributors Association
National Business Forms Association
National Candy Wholesalers Association
National Commercial Refrigeration Sales Association
National Electronic Distributors Association
National Fastener Distributors Association
National Food Distributors Association
National Frozen Food Association
National Independent Bank Equipment Suppliers Assn.
National Industrial Belting Association
National Industrial Glove Distributors Association
National Lawn & Garden Distributors Association
National Locksmiths' Suppliers Association
National Marine Distributors Association
National Paint Distributors, Inc.
National Paper Trade Association, Inc.
National Plastercraft Association
National Sash & Door Jobbers Association
National School Supply & Equipment Association
National Solid Wastes Management Association
National & Southern Industrial Distributors Associations
National Spa and Pool Institute
National Truck Equipment Association
National Welding Supply Association
National Wheel & Rim Association
National Wholesale Druggists' Association
National Wholesale Furniture Association
National Wholesale Hardware Association
Northamerican Heating & Airconditioning Wholesalers
North American Wholesale Lumber Association, Inc.

Optical Laboratories Association
Outdoor Power Equipment Distributors Association

Pet Industry Distributors Association
Petroleum Equipment Institute
Power Transmission Distributors Association, Inc.

Safety Equipment Distributors Association, Inc.
Scaffold Industry Association
Shoe Service Institute of America
Specialty Tools & Fasteners Distributors Association
Spring Service Association
Steel Service Center Institute

Textile Care Allied Trades Association
Toy Wholesalers' Association of America

United Pesticide Formulators & Distributors Association

Wallcovering Distributors Association
Warehouse Distributors Association for
  Leisure & Mobile Products
Watch Materials & Jewelry Distributors Association
Water and Sewer Distributors Association
Wholesale Florists & Florist Suppliers of America
Wholesale Stationers' Association, Inc.
Wine & Spirits Wholesalers of America, Inc.
Wood Heating Alliance
Woodworking Machinery Distributors Association

NATIONAL ASSOCIATION OF WHOLESALER-DISTRIBUTORS
1725 K Street, N.W., Washington, D.C. 20006 202/872-0885

CENTRAL STATES
SOUTHEAST AND
SOUTHWEST AREAS
PENSION FUND

APPENDIX B

EMPLOYEE TRUSTEES
LORAN W. ROBBINS
MARION M WINSTEAD
HAROLD J YATES
EARL L JENNINGS, JR

EMPLOYER TRUSTEES
HOWARD McDOUGALL
ROBERT J BAKER
THOMAS F O'MALLEY
R V PULLIAM SR

10:25 am
RECEIVED
MAY 1 - 1981
TEAMSTERS UNION LOCAL 135

April 30, 1981

Mr. James R. Nolan
Secretary Treasurer
Local Union No. 135
1233 Shelby Street
Indianapolis, Indiana 46203

RE: POTENTIAL WITHDRAWAL LIABILITY OF
NATIONAL LIQUOR CORPORATION

Dear Mr. Nolan:

This letter is in response to your correspondence to Mr. Jack Yarbrough, dated April 24, 1981, regarding the above-captioned employer. Specifically, you have requested information concerning the potential continuing liability of National Liquor Corporation ("National Liquor") if that employer initiated a "complete" withdrawal from Central States, Southeast and Southwest Areas Pension Fund (the "Central States Fund"). This office has made certain approximate calculations based on the information furnished and the comments that follow are for your further consideration.

(1) Records available at the Central States Fund indicate that the collective bargaining agreement by and between National Liquor and Teamsters Local Union No. 135 terminated effective May 1, 1980. If such agreement was renegotiated without a continuing obligation (by National Liquor) to make contributions to the Central States Fund, a "complete" withdrawal would occur as that term is defined in §4203(a) of the amended Employee Retirement Income Security Act of 1974 ("ERISA"). 1/ In this event, the Central States Fund Trustees would be obligated by federal law to determine the amount of that withdrawal liability, demand payment of such amount and also to enforce its collection. 2/

(2) The Central States, Southeast and Southwest Areas Pension Plan, effective January 1, 1976, has been amended in accordance with ERISA to provide for the Modified Basic Method (Two Pool Approach) of calculating employer withdrawal liability. 3/ Essentially, this method looks to two time periods for such calculation, one for years prior to 1980 and another for years 1980 and later. However, such

1/ 29 U.S.C. §4203(a).
2/ Op. cit., §4202.
3/ Op. cit., §4211(c)(2).

computations end in the plan (i.e. calendar) year prior to the date of the "complete" withdrawal in question. Since the potential "complete" withdrawal of National Liquor would take place in 1980, withdrawal liability would be calculated on the basis of the five years preceding 1980 (i.e. 1975 through 1979).

(3) Based on the estimated total contributions made to the Central States Fund by National Liquor during the years 1975 through 1979, its approximate employer withdrawal liability to the Central States Fund as of May 1, 1980 would be $443,396. The precise calculations for this preliminary figure are stated on the enclosed worksheet.

You should be aware that the figure recited above, and the calculations contained in the enclosed worksheet, are approximations at this time and must be verified before any formal determination with respect to withdrawal liability is made by the Central States Fund Trustees. If the contribution amounts paid by National Liquor do not vary substantially, however, then this estimated withdrawal liability would appear reasonably accurate and, in any event, would not fall under the statutory "de minimis" rule stated in ERISA. 4/ Further, there is a question whether payments of withdrawal liability would be a deductible expense to a withdrawn employer under the Internal Revenue Code of 1954 since ERISA also states that such payments "shall not be considered contributions." 5/

Staff of the Central States Fund is now in the process of preparing liability determinations with respect to those statutory withdrawals occurring in the 1980 plan year for Trustee consideration. For this reason, we would appreciate your clarification of the present status of National Liquor and its obligation to make contributions to the Central States Fund. Thank you for your assistance in this matter.

Very truly yours,

George H. Faulkner

George H. Faulkner
Assistant Counsel

GHF:cc

cc: Jack Yarbrough
Bruce C. Trojak
Clyde L. Peterson, Esq.

enclosure

4/ Op. cit., §4209(a)
5/ Op. cit., §4212(b)

ESTIMATED EMPLOYER WITHDRAWAL LIABILITY*

(1) Employer: National Liquor Corporation
1102 E. 16th Street
Indianapolis, Indiana 46202

(2) Account No.: 5779800-0103

(3) Labor Contract
Expiration Date: May 1, 1980

(4) Approximate Withdrawal Liability:

(A) Amortized value of the 12/31/79 unfunded vested liability of the Central States Plan: $3,575,782,000

(B) Contribution amounts required to be paid by National Liquor Corporation during:

1975	$35,277.00
1976	40,577.00
1977	47,478.00
1978	62,702.00
1979	72,404.00
(i) Total	$258,438.00

(C) Total contributions made to the Central States Plan from 1975 through 1979: $2,083,882,217

(D) Item (B)(i) divided by Item (C): $.000124

(E) Item (A) multiplied by Item (D) to determine the unadjusted pre-1980 portion of withdrawal liability: $443,396.97

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*These figures are estimates and subject to further verification.

APPENDIX C

*Synopsis of Legal Issues Surrounding MPPAA

In Peick vs. Pension Guaranty Corporation (No. 81-C-1911; N.D. Ill; 1981), it was alleged that the MPPAA has failed to establish "intelligible standards" by which employers can determine if they have withdrawn. The employer associations complained that not only the withdrawal provisions of the trust agreements are impaired by the MPPAA but also the collective bargaining agreements to which they were parties. The arbitration provisions of the MPPAA are alleged to violate the Fifth and Seventh Amendments to the Constitution.

In Johnson Motor Lines, Inc. vs. Central States, Southeast and Southwest Areas Pension Funds (No. 81-C-3703, N.D. 111, 1981), the court issued a temporary restraining order preventing the pension fund from collecting alleged withdrawal liability. Johnson challenged the MPPAA provisions for compulsory arbitration on the basis that the presumptions in favor of the fund amount to the taking of property without a prior hearing in violation of the due process clause of the Fifth Amendment and compulsory arbitration results in a denial of a right to a jury trial guaranteed by the Seventh Amendment.

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*Prepared by Feldman, Krieger, Goldman & Tish, Washington, D.C.

Johnson argued also that retroactive application of the withdrawal liability provisions of the MPPAA not only contravenes the fair warning requirements of due process but also the contractual limitations of liability on which an employer has a right to rely when it decides to terminate operations.

In Bangor Punta Corp. vs. Pisano (No. 81-1688-Z, D.C. Mass. 1981), the court was asked to order declaratory and injunctive relief against a fund's trustees by a company that was withdrawing from a multiemployer pension fund following the decertification of the union as the bargaining representative of its employees.

The company asked the court to declare that it was not liable for any amount in excess of the defined amount due under its collective bargaining agreement or any amount in excess of the very minimum amount necessary to fund the vested benefits for only its employees. It requested that the trustees be enjoined from imposing any liability in excess of the minimum and to declare that the PBGC's failure to adopt regulations concerning withdrawal liability violated its rights of due process and equal protection.

In Terson Co., Inc. vs. Pension Benefit Guaranty Corporation (No. 81-C-4176), the United States District Court for the Northern District of Illinois issued a temporary restraining order barring the trustees of a Teamster multiemployer pension fund from (1) collecting withdrawal liability, (2) declaring Terson in default for the nonpayment of its liability, and (3) commencing arbitration proceedings. In addition to the PBGC, defendants in the case included the Secretaries of Labor and Treasury and the Trustees of Teamsters Local 734 Pension Fund. This case involves a withdrawal from a multiemployer fund after September 26, 1980. Terson argues that if the correct interest rate assumptions were used, the pension fund's assets would exceed the amount necessary to provide all presently vested benefits in one plan covering its employees and would be adequate to provide such benefits in the other plan covering its employees. It asserts, therefore, that withdrawal liability payments were neither needed by the fund nor required by its collective bargaining agreements.

Terson has sought a declaratory judgment that the withdrawal liability provisions of the MPPAA are arbitrary, and unreasonable and violate the Fifth and Seventh Amendments. It has argued that the provisions "do not represent a rational means to a legitimate legislative purpose in that Congress did not take into account the inequities of the burdens imposed upon [Terson] and failed to include statutory provisions designed to limit and moderate the impact of the aforesaid burdens." Terson challenges also the MPPAA provisions for being more onerous than those imposed by ERISA on employers that contribute to single employer plans, for taking property without due process by imposing liability for unfunded vested benefits inherited from employers that withdrew before the MPPAA was enacted, for being vague by conditioning liability and sanctions upon statutory language that "affords insufficient objective standards of conduct and for establishing compulsory arbitration of disputes in violation of the Fifth and Seventh Amendments.

In Woodward Sand Co. vs. Operating Engineers Pension Trust, 2 (S.D. Ca., 1981), the Company had stopped contributing to the pension trust after it had reached an impasse in collective bargaining and its contract with the Union had expired in August 1980. In August 1981, the pension fund sent Woodward a demand for withdrawal liability which caused Woodward to challenge the constitutionality of the MPPAA. Woodward maintained that the withdrawal liability provisions of the act were unconstitutional because they deprived it of its property without due process of law, took its property for public use without just compensation and took away its rights of access to the courts and a trial by jury, all in violation of the Fifth and Seventh Amendment to the Constitution.

Senator NICKLES. Your actuary, Mr. LaCrosse, basically said that the total vested liability of your employees are still working with you, is that correct?

Mr. LACROSSE. That is correct.

Senator NICKLES. I see.

Mr. LACROSSE. We asked the actuaries to determine of those employees that pulled out with us with the fund what it would cost to cover the vesting that the Central States had covered, and that figure came out to around $188,000.

Senator NICKLES. Those are people who, when they retire, Central States will pay them some retirement.

Mr. LACROSSE. That is correct.

Senator NICKLES. What type of vesting schedule do they have under the Central States plan?

Mr. LACROSSE. It is a 10-year vesting, and in the 10th year, I believe they receive $115 per month; in the 19th year, they receive $175 a month; in the 20th year, it jumps to $400 a month.

Senator NICKLES. Nothing, if they have 9 years?

Mr. LACROSSE. Correct.

Senator NICKLES. What type of pension plan have you set up or are you setting up?

Mr. LACROSSE. We have filed a plan with the IRS, which should be approved soon.

Senator NICKLES. What type of plan is it?

Mr. LaCrosse. It is essentially tailored after the Teamster program; however, the benefit schedule is higher. The death benefits, spouse, and everything else are basically the same. We really tried to tailor the plan after that. However, we feel that over the period of years, we will be able to improve the benefit levels.

We are also guaranteeing on our plan that, whether Central States is there or not, we will cover the total amount. In other words, if one of my men is supposed to receive $400 a month from the Teamsters and for some reason should not, we will pick up that liability, of my employees.

Senator Nickles. The employees, by going out of the Teamsters' plan and setting up in your pian, if they work there for 6 years, they are not starting all over.

Mr. LaCrosse. No, no. We are picking up all their service liability. And we are more than willing—and I think most employers are as concerned about their employee pension programs as Congress is—in fact, probably more so. It is difficult to face somebody who has worked for you for 30 years and announce to him that he has no pension. And we feel that we can handle that job better ourselves and over a period 20 or 30 years, can fund whatever our liability is. We just cannot afford to fund both. We cannot afford to fund Central States and our own liability.

Senator Nickles. I think that is part of the point that you were making. I mean, you said that you have 21 employees, 4 of which will receive about $400 per month, and 17 who will receive $175 per month?

Mr. LaCrosse. Up to $175. It varies from $115 to $175.

Senator Nickles. Your actuary has stated that the present value of those liabilities is $188,000.

Mr. LaCrosse. That is correct, Senator.

Senator Nickles. And in the past, you have already put in $250,000.

Mr. LaCrosse. We have put in substantially more than that. We have put in $258,000 over the last 5 years, but we have been in the program since 1935. And I have asked Central States for our total contributions, the total benefits that have been paid out to the 10 people we feel have retired, to determine what our total liability should be if the fund were run correctly as a single employer fund, and we have not been able to get that information.

Senator Nickles. You have put in $250,000 in the last 5 years, but you have put in many more thousands over a period of time, and you think it is reasonable to assume that you should have had some interest accumulated on that amount?

Mr. LaCrosse. I would think so. I would be very happy if Central States' paid me back the money that I put in, and we assume all the liabilities.

Senator Nickles. But yet, you have a bill for $500,000.

Mr. LaCrosse. That is correct.

Senator Nickles. The fact that you had a decertification election—did this get involved in the decertification election?

Mr. LaCrosse. No; it did not. We had mixed emotions about the decertification, because we realized that this withdrawal liability would come up. But we had some major problems with the Teamsters, so I am not sure which would have been worse.

Senator NICKLES. Do you feel that under the present law if we did not make some changes—we have heard other people testify, and Mr. Fordham testified to it very well, that new employers will not enter into multiemployer pension agreements? I can see a problem where with the decertification, you may just have a freeze, unless somebody is willing to take the pain or the gamble of the withdrawal liability.

Mr. LACROSSE. We have outlined this in our prepared statement, and that is really quite right. I think the way it worked out, since the Teamsters allow dues-paying members to vote, and at the time, out of 109 members, there were only 9 dues-paying members, we could have signed a contract with the Teamsters, and it could have been ratified by 9 members, and accepted. And the other 100 people would have been required to join. That is all we would have had to do, to avoid this withdrawal liability. We chose not to do that. But I would think it would substantially deter management from either supporting or helping a decertification. They would, I presume, try to talk their employees out of it.

Senator NICKLES. Thank you, Mr. LaCrosse. I appreciate that.

Mr. Zegar, do you think we should come up with different exemptions for each particular industry as it hits, as a possibility?

Mr. ZEGAR. Not necessarily. The Motor Carrier Act of 1980, in effect, gave similar status to the private carriers as regulated carriers have always had which would make them much more competitive. So all we are saying in this respect is, lets keep the Motor Carrier Act and the Multiemployer Act from certain a head-on collision. They are in direct opposition of each other.

Senator NICKLES. Head on from the standpoint of union/nonunion?

Mr. ZEGAR. Well, let me have Mr. Bourghesani explain this as he is our transportation counsel.

Mr. BOURGHESANI. Well, Senator, what happened with the Motor Carrier Act, which was signed July 1, 1980, just a few months prior to the MEPPAA Act, the subject of this hearing, was that we had for the first time the introduction of meaningful competition in the trucking industry with liberalized entry. So there was a mass influx of new carriers coming onto the scene, duly authorized by the ICC. Many of them are nonunion carriers, and their rates are generally 30 percent below the Teamster rate. So management, shippers, receivers, and even those in private carriage, were greatly attracted by these new carriers, and it produced a tremendous amount of Teamster unemployment. They admit that 50,000 to 120,000 drivers left the Teamsters' Union because those employers could not afford to pay Teamster scale wages and fringes in competition with the nonunion truckers. Many of our NAWGA members are being attracted by these outside, nonunion carriers, because they are much less expensive. This is in turn impacting their own operations and their flexibilities. They might like to relocate, they might like to cut down on some of the work force, they might like to shift some of the traffic they carry themselves to outside carriers.

Senator NICKLES. But they are not able to do so because of this?

Mr. BOURGHESANI. Right. So this is the collision that Mr. Zegar is attempting to document for this committee. This is aggravated, I would say, by the recession, as well.

Mr. ZEGAR. I might also say one other thing, Senator. I hope that, in light of all the testimony that you hear today and in the next few days, that you will also give serious consideration to title VI of S. 1541, which may have similar affects on single employer pension plans.

Senator NICKLES. I would debate with you whether or not we are doing the same thing in S. 1541 as what happened in the multiemployer. We are talking about totally and entirely different aspects from the vantage point that you are talking about. A single employer has control over benefits and liabilities, as contrasted to the contractual liabilities under really, almost, a defined contribution plan with defined benefit liabilities. There is a world of difference between the two, so do not confuse the two, because I happen to be pretty familiar with S. 1541.

Mr. ZEGAR. Right, I understand that. I recognize that difference. However, you eliminate the 30 percent net worth test, again, and it can go to 100 percent or more. That can present real problems, and it also can present problems in that you may be secondarily liable for 15 years. That would tremendously impact on small business.

I used to be the financial analyst for the Senate Small Business Committee, and we talked to many small businesses, and they are afraid they will not be able to sell, because they will not be able to live with that liability for 15 years.

Senator NICKLES. I will not debate S. 1541 with you. I happen to be a small businessman also. But there is a misconception. There may be some similarities, yes, in going from 30 to 100 percent, as it is presently in our bill; we may change some of that. But there is a real misconception of a reenactment of what we did under multiemployer, because it is an entirely different situation. I hope that the industry is aware of that fact. We are talking about two different ball games entirely.

Gentlemen, thank you very much. We appreciate your testimony.

For our next panel, we have Mr. Julian Freirich, president of Julian Freirich Co., Long Island City, N.Y., and William J. Condon, counsel, on behalf of the National Meat Association; and Mr. Charles R. Naylor, Jr., vice president of labor relations, Dubuque Packing Co., Dubuque, Iowa, on behalf of the American Meat Institute.

Mr. Freirich?

STATEMENT OF PAUL KORODY, DIRECTOR OF PUBLIC AFFAIRS, NATIONAL MEAT ASSOCIATION, ACCOMPANIED BY WILLIAM J. CONDON, EXECUTIVE DIRECTOR AND GENERAL COUNSEL OF THE MEAT TRADE INSTITUTE, AND CHARLES R. NAYLOR, JR., VICE PRESIDENT, LABOR RELATIONS, DUBUQUE PACKING CO., DUBUQUE, IOWA, ON BEHALF OF THE AMERICAN MEAT INSTITUTE, A PANEL

Mr. KORODY. Thank you, Mr. Chairman.

I apologize that Mr. Freirich is unable to attend today, and I would like to submit his statement for the record and very briefly summarize his comments.

Senator NICKLES. If you would very briefly, we would appreciate it.

Mr. KORODY. Thank you, Mr. Chairman.

My name is Paul Korody, and I am director of public affairs for the National Meat Association. Accompanying me today, to my right, is William Condon, executive director and general counsel of the Meat Trade Institute, a New York City association representing meat industry employers in the greater New York City area. He has been involved in the administration of pension plans for 15 years, and assisted in the preparation of our statement.

Very briefly, Mr. Chairman, we believe that the law and the amendments have failed to accomplish their original purpose, and in the course of that failure, has developed new problems which were not foreseen at the time of enactment.

For this reason, our membership strongly supports your efforts, Mr. Chairman, and those of Senator Hatch, and hopefully others, to change the law.

The first of these problems is found in the damage that withdrawal liability has caused to the collective bargaining relationship. We have found that when the parties now sit down at the bargaining table, the union is no longer in a position to seek pension improvements from the employers, with any real optimism that those improvements can be instituted. The employers have become so frightened of the liability which this statute entails that all manner of problems arise, leading to either industrial strife or to agreements which do not reflect the needs, the hopes, or the plans of the employees.

Second, we feel that act has created a tremendous amount of friction between trustees across the table in plans which have run smoothly for years. And perhaps equally important, we have found, the law has created tremendous problems between trustees on the same side of the table, representing employers.

Under the statute, the latitude given to trustees to make different rules and assumptions now creates a problem when small employers are seeking a higher de minimus rule which would allow them to escape without liability, as opposed to larger employers who do not want any escape from liability for other employers than themselves.

There is also, Mr. Chairman, an argument between those employer trustees who seek to raise the interest assumption, thus confusing the liability, and those more conservative employer trustees who feel that they may be likely to be the last one at the table and be committed to pick up the check.

The third problem, quickly, which the statute has created for our industry and for others, and certainly for smaller employers which we represent, is the very serious problem of the difficulty that withdrawal liability has presented to an employer who wants to retire and go out of business. This is now impossible. He cannot close his door unless he wants to see his whole life's work go down the drain.

The final problem which is becoming more and more acute is the fact that lenders are becoming very aware of this fact, and that a liability hangs over the potential borrower. This affects our ability to obtain credit and, Mr. Chairman, ours is one of the most highly leveraged industries in the countries. Our statement spells out these problems in greater detail. We do have one or two suggestions.

We would suggest, for example, that a restudy be made of the conclusions reached by the PBGC in the study which the corporation submitted in 1978. It appears to us that the study is based upon an economic model which has proven false. The termination of the plan since 1978 has not occurred, and it does not appear at all that likely to occur within the 10-year span, 4 years of which are already over. We believe that a new study would show that the appropriate premium that this group would follow would be substantially less than the premium suggested by the PBGC.

On the other hand, it is quite possible that up-front money is not necessary. Rather, the problem may very well be solved by simply adopting some kind of an approach whereby all plans which survive might contribute proportionately at the time of default to discharge the UDB of the plan which was terminated for economic and insolvency reasons.

Thank you, Mr. Chairman. Mr. Condon and I will be most happy to answer any questions that you may have.

Senator NICKLES. Thank you very much.

[The prepared statement of Mr. Korody follows:]

TESTIMONY

OF

JERRY FREIRICH

WILLIAM J. CONDON, ESQ.

ON BEHALF OF

THE NATIONAL MEAT ASSOCIATION

Mr. Chairman, my name is Jerry Freirich, and I am head of a family-owned business in New York City called Julian Freirich Company, Inc. I am also Chairman of the National Meat Association Pension Committee.

Accompanying me today is William J. Condon, Executive Director and General Counsel of the Meat Trade Institute, a New York City association representing meat industry employers in the Greater New York City area.

The National Meat Association is a major trade association for the meat packing and meat processing industry. Included in our national membership is close to 300 companies which account for approximately 70% of the nations beef industry and substantial portions of the pork and processed meats industries. Combined annual sales of our membership is close to $20 billion.

My company has collective bargaining agreements with several Unions, all of whom represent my employees. Pursuant to my company's contracts with those Unions, we make contributions to their jointly-administered pension funds. The Union which represents most of my employees is affiliated with the United Food and Commercial Workers International Union and the pension fund into which I pay contributions has been in existence since 1953.

I am before you today, as a small businessman, to give you my reasons why I believe that the MPPAA is a piece of legislation which Congress should either repeal or amend. To this extent our association fully supports the efforts of the Full Committee Chairman, Mr. Hatch, and the Labor Subcommittee Chairman, Mr. Nickles, to seek these changes.

It is not sufficient to say that both industry and labor jointly lobbied for this well-intentioned legislation. In point of fact, only a handful of people participated in developing the law and the small business community was neither adequately represented nor did it have the resources to participate in the lobbying preceding the enactment of the Bill. Few people are expert enough to understand that the Bill had an unintended impact on the business community.

Legal corporate counsel representing small businesses do not have the expertise to properly assist businessmen in evaluating the affects of the legislation. Congress itself was compelled to rely, to a large degree, upon the advice and assistance of the PBGC which, I believe, had somewhat of a vested interest in preserving its own identity.

In particular, I object to that portion of the law which makes it clear that when any pension plan seeks any form of exceptional relief under the Act, that the first duty of the pension plan is not only to act in the best interests of the participants but to act in a way which "would not significantly increase the risk of loss to plan participants or beneficiaries or to the corporation" (Secton 4211(c)(5)(A).

I. Relationship with Employees-Union

As you know, the Act permits Trustees to adopt different interest assumptions for the purpose of calculating a plan's unfunded vested benefit liability (UVB). Depending upon the interest assumptions used by the Trustees, the plan may have a greater or lesser UVB. In some situations, the UVB may entirely disappear when the trustees use a high interest assumption. Part of the trade-off in lobbying for the legislation was a reduction in the guarantees offered to the plan participants. In a declining industry which has fewer and fewer contributors, the use of liberal interest assumptions may turn out to be illusory and, if a plan becomes insolvent or terminates, plan participants will have a guarantee which is considerably less under the current Act than would have been the case prior to its adoption.

Make no mistake about it, as an employer I have a deep concern with regard to the welfare of my employees and I have not totally abrogated that responsibility to the Unions which represent them. I want to be assured that the benefits which were promised to my employees will, in fact, be made available to them when they retire.

My company is part of an Association which negotiated a collective bargaining agreement with the Union which called for substantial increases in pension contributions which, it was understood, would provide an improvement in benefits as of July 1, 1982. This contract was negotiated in May 1980 and the Act was adopted in September 1980. As a consequence, the Employer Trustees have become deeply concerned about whether they can, in good conscience, adopt those benefit improvements in the face of the UVB amounting to more than $49 million. The Union in its subsequent bargaining with other groups contributing to the pension fund was unable to negotiate benefit improvements of the magnitude to which my group had agreed. The bargaining parties essentially ended up bargaining only with regard to the size of the liability. Faced with the uncertainty caused by the new law, employers are unwilling to provide for benefit increases (even in these inflationary times) which will only succeed in increasing their personal responsibility. Thus, the Act has caused--and will continue to cause--disruptions in the bargaining relationships between Union and Management and the only ones who will suffer in the long run will be the very employees who we are trying to protect.

II. Conflicts Between Trustees

Because the Act permits subjective application of its various rules by the Trustees, it tends to cause serious conflicts not only between Union and Management Trustees but between the Employer contributors in a declining industry. It is all the more important that the Union has some latitude and flexibility in terms of organizing new companies whose employees would ordinarily be covered by the pension fund. Those employers who presently contribute to the fund find it in their best interest to see to it that any new employer will share in the UVB to the maximum extent. This has already confronted the Union with serious problems in bringing new employers into the fold. Thus, current employers end up sharing a larger and larger piece of the remaining liability. Small employers participating in the Fund are putting pressure on the Trustees in order to permit them to escape liability under the de minimus rule and the larger employers are resisting these efforts.

III. Business Uncertainties

In our industry, profit margins are small and the hazards are great. Profits are measured in fractions of a cent per pound of product processed and sold. It is essential for an employer in our industry to know that when he bargains with the Union he will at least have some predictable control over his labor costs. We are already subject to the whims of a market in which raw meat prices vary on a day-by-day basis. If we cannot know that our fringe benefit and labor costs are stable, our bargaining agreements will be limited in scope and we will take every measure to hedge our bets. Many employers are already hampered in terms of their ability to secure financing for their operations and the lending institutions are already aware that an employer's contingent liability to a pension fund (over which the employer has little or no control) must be taken into account in determining the security of any loan. It is not critical at this point whether the American Institute of CPA's will adopt a rule compelling that an employer's contingent liability be reflected in his financial statement. The banks and factors are already aware of this situation.

Those businessmen who have family members or other associates participating in their business have already had to consider whether the company's liability to a pension fund can be properly taken into account in terms of any existing payout agreements or arrangement providing for the payment to their widows or their estates in the event of their deaths. Thus, the Act has already interfered with the internal stock buyout and partnership arrangements within these companies. I am speaking here of the non-public corporate entity or partnership. Furthermore, the Act has already restrained trade by making it prohibitive for an employer to sell his assets or his business because no potential purchaser can enter into such an arrangement without taking into account the liability of the seller to the pension plan. In the case of my business, my estimated liability, to just one of the pension funds to which I contribute, is $640,000. I do not have family members who wish to succeed me. My ability to withdraw from my business and sell it for a fair price in the market place has already been drastically affected and I will be unable to reap the rewards that I might otherwise be entitled to after 60 years in business.

IV. Conclusion

Finally, we believe that there are alternatives and that it is not necessary merely to repeal the Act without substituting in its place something that might work. I am not a technician, but it is my understanding that the PBGC submitted a study to Congress on July 1, 1978 and that this study painted such a bleak picture that it motivated Congress to enact MPPAA. It is my opinion that Congress should see whether or not those predictions have indeed come true, since almost 4 years have passed since the study was done.

In particular, the PBGC study of multiemployer plans said that about 10% of the multiemployer plans, involving 1.3 million workers, were experiencing financial difficulties that could result in termination by July 1988. The PBGC said that if those potential terminations were to occur, the estimated value of the unfunded liability for guaranteed benefits would be $8.3 billion and it concluded that in order to finance those liabilities, an annual premium of $80 per participant would be required ($45 if large, broad-based plans are excluded).

It is my contention that Congress should once again study and review the validity of the PBGC assumptions and that it may very well conclude that it would be more sensible to finance a contingent employer liability insurance program through the imposition of a $45 per year premium rather than to proceed with the current method. Of course, I can only guess that the premium would actually be significantly less. The cost of administering a withdrawal liability program is already prohibitive and plans are already incurring great expense in administering such a program in attempting to recover unpaid liabilities. This should be taken into account by Congress in determining whether it wishes to continue the present program.

Mr. Chairman, I and Mr. Condon will be happy to answer any questions the committee might have. Thank you, Mr. Chairman.

Senator NICKLES. Mr. Naylor?

Mr. NAYLOR. Thank you, Mr. Chairman.

My name is Charles Naylor, and I am vice president, labor relations, Dubuque Packing Co. I am here today to testify in behalf of the American Meat Institute, which represents hundreds of packinghouse employers in the meat packing and processing industry.

I am going to try and skip over much of my prepared testimony, but several items, I would like to specifically draw your attention to.

I believe that as employers begin to realize the potential scope of this problem, I am convinced they will withdraw from the plan, even if it means assuming the existence of withdrawal liability. The reason for this is the experience that we recently had with two of our plants which, in fact, were closed in 1981.

We had a plant in south San Francisco, which was a fairly old plant. It had approximately 110 employees. It closed for a variety of economically based decisions, not one of which was this liability that we are talking about today. For those 110 employees, our withdrawal liability was a little over $1 million. We have not paid any of that amount. We are appealing it. We are having considerable trouble getting information from the California Butchers' Pension Trust Fund. We asked for several types of information and received this response:

> It has further been determined, however, that the other information requested would not be material or relevant to any review of the accuracy of the withdrawal liability computation that you undertake, and is confidential and privileged.

So I would support earlier remarks you have heard today, that those of us who are being assessed these withdrawal amounts are not even being given adequate information to determine whether those amounts are correct.

In another situation, we had a plant in Vinton, Iowa, which was a much younger plant, and had only participated in a multiemployer plan for about 4 years, with very low contribution rates. And because of that combination of facts, withdrawing in 1981 will generate a very small withdrawal liability. We have not been advised of the amount, but we think it may be very close to a de minimus amount, which will minimize our liability.

As a result of this experience, I would ask to make two recommendations to any employer presently participating in or considering participation in a multiemployer pension plan.

First, if presently in, withdraw at the earliest practical date, and bite the bullet that you have to bite; and second, do not enter such a plan under any circumstances.

I would like to point out that we have several other plans in which we are the sole participant in the pension plan, and we must say that we feel that we have done a far superior job at managing the assets of the plans under our own control.

Senator NICKLES. Single employer plans?

Mr. NAYLOR. Yes, sir. And I would agree with an earlier remark made by another witness, if they would give us the money back, we would probably be glad to take on the full liability, instead of worrying about the unfunded liability.

But I would suggest to you that all the 1980 amendments have done is to create additional costs for multiemployer plans, because they are having to fight all these lawsuits. And we have just seen the tip of the iceberg on the amount of suits that will be filed. And I am quite sure that over our withdrawal liability in San Francisco, we will ultimately be in court, although no litigation has yet been filed.

I do want to thank you and the other members of the committee for affording me this opportunity, and thank you for your concern.

[The prepared statement of Mr. Naylor follows:]

Testimony of

Charles R. Naylor, Jr.
Vice-President - Labor Relations
Dubuque Packing Co.
Dubuque, Iowa

Representing the

AMERICAN MEAT INSTITUTE
Washington, D. C.

Mr. Chariman: My name is Charles Naylor, Jr. and I am Vice-President - Labor Relations for Dubuque Packing Company in Dubuque. I am here today to testify in behalf of the American Meat Institute (AMI), a national trade association which represents the meat packing and processing industry. Since 1980, AMI has become increasingly aware of the serious problem facing its members who participate in or have considered entering into Multi-Employer Pension Plans. I am pleased to have the opportunity to be here today to testify in support of S. 1748 and relate to you Dubuque Packing Company's experience with the multi-employer pension plans in which we participated.

I recognize that the 1980 amendments were enacted to ensure the economic viability of multi-employer pension plans, but I respectfully suggest that the net effect has been just the opposite.

Over the past twenty or thirty years, a large number of companies in the meat industry have negotiated with their unions and agreed to participate in multi-employer pension plans. I have personally been actively involved in such negotiations and in the past I preferred multi-employer plans to single-employer plans because I could identify and control the cost of the fringe benefit. By negotiating a contribution amount instead of a benefit, I was authorizing the plan trustees to purchase the maximum benefits possible for the money that was available.

The law imposed fiduciary responsibilities and liabilities on them if they were reckless in fulfilling their duties. The 1980 amendments have, however, reversed that relationship. Employers are now liable for payments sufficient to guarantee whatever benefits the trustees choose to provide. The responsibility for the viability of the plan and guarantee of benefit levels has been transferred from the trustees of the plans to the employers who had originally agreed only to claim responsible for funding the plan by virtue of making specified contributions agreed to during the collective bargaining process. In essence, the 1980 amendments effectively transfer liability for payment of benefits to employees covered under multi-employer pension plans from the trustees and place it on the employers.

As employers begin to realize the magnitude and potential impact of this problem I am convinced they will proceed to withdraw from these plans at the earliest possible date to minimize their withdrawal liability. Indeed, many participants are already considering a slow reduction of personel in a given bargaining unit so their withdrawl would not trigger a financial liability. This slow withdrawal process could leave a small number of employers remaining in these plans with a significant burden. But the simple fact is this - since the imposition of the 1980 amendments, multi-employer pension plans are not a wise choice for employers to participate in. In 1981, Dubuque Packing Company closed two plants which had participated in multi-employer pension plans. I feel that these two examples show why it is best to withdraw from a multi-employer pension plan at the earliest practical date. One of our plants, in South San Fransisco, was an older plant employing 110 people; the withdrawal liability was a little over $1,000,000.00. Another plant, in Vinton, Iowa, was newer, had been in a pension plan for only a few years with low contribution rates and covered approximately to employees. The withdrawal liability for this plant has not yet been determined, but may be below the de minimus amount.

As a result of my Company's experience, I would have to make two recommendations to any employer presently participating in or considering participation in a multi-employer pension plan:

(1) if presently in, withdraw at the earliest practical date and/or

(2) do not enter such a plan under any circumstance.

It has been my experience to note that the disparity will only worsen if an employer does not withdraw until after a majority of the other participating employers have withdrawn.

The only way to stop this "race to the gate" in which participating employers will be withdrawing from these plans in droves is to amend Title IV of ERISA with S. 1748 and return to the prior concept of ensuring that plan trustees are responsible for fulfilling their statuatory obligations as is done in the single-employer plans. I am sure that other witnesses have testified on the unfairness of the amendments due to the fact they impose classic ex post facto liability on one party to a contract even if that party has fully honored its contractual liability. An interesting development has occurred in the California Butchers Pension Plan. The employer trustees have brought suit against the union trustees for breach of their fiduciary duty in that they voted for benefits in excess of what the plan's funding levels could support.

Such lawsuits will proliferate if the 1980 amendments remain unchanged because employers simply cannot allow a third-party such as union trustees to control a basic and increasingly expensive aspect of their operating cost. If the government is unable or unwilling to enforce its fiduciary laws, then the employers must do it themselves.

Mr. Chairman: Thank you for this opportunity to strongly support prompt passage of S. 1748. I feel that this legislation is probably the only answer to guaranteeing the viability and continued existence of multi-employer pension plans.

Very truly yours,
Dubuque Packing Co.

Charles R. Naylor, Jr.
Vice-President - Labor Relations

Senator **Nickles**. Mr. Naylor, are you based out of Iowa?

Mr. **Naylor**. Yes, sir.

Senator **Nickles**. And you had a plant in California, and it is now closed—when did you close that?

Mr. **Naylor**. That closed in January of 1981.

Senator **Nickles**. January of 1981. You were aware of the potential withdrawal liabilities when you closed it?

Mr. **Naylor**. We were aware of the act, but I would say that we were not aware because of the enactment. On the availability of financial information, we were unaware that we would be given a million dollar bill for 110 employees.

Senator **Nickles**. The multiemployer plan was what plan in California?

Mr. **Naylor**. It is the California Butchers' Pension Trust Fund.

Senator **Nickles**. And you have no information on the status of that fund, the size of it, assets, liabilities?

Mr. **Naylor**. We have some information, but it is summary information. It is not the type of information that gives us any sense of confidence that we are being adequately protected.

Senator **Nickles**. What type of vesting schedule did they have in their pension fund? Did you have to work there 10 years before you would be vested, or 5, or what?

Mr. **Naylor**. There is a 10-year requirement. All of the employees that we had working, or very close to all of them, had 10 years in, so in our case, the majority of the 110 were vested.

Senator **Nickles**. Older plants and older ages, probably.

Mr. **Naylor**. Yes, sir. There had at one time been 300 employees, but over the last 15 years, it had worked down to only 110.

Senator **Nickles**. Did you have an independent actuarial study done on those 110, plus your present retired employees, to see what that type of liability would be?

Mr. **Naylor**. No, sir, we have not done that.

Senator **Nickles**. I am not going to advise you what to do, I know if I were in your shoes, I would, because you are talking about a couple of thousand dollars to find out what an independent actuary would say regardless of what you have put in in the past, and you could come up with those figures. Do you know how much money was put in?

Mr. **Naylor**. I would concur with your statement, Senator, but the problem is that we are still in the preliminaries. It took them about 8 months to get us the amount, and it seemed to us that we should wait until we got their information and then proceed in a more orderly fashion. We expect in 1982 we will spend a great deal of time, effort and money doing that, although we are hopeful that this act will be acted on quickly and will help us.

I would like to add one thing in response to some questions you have raised. I do not think the specific industry exemptions is an adequate resolution to this problem. The bill that you are proposing should deal with all segments of American industry and not specifically eliminate trucking, meatpacking, what-have-you, because there are other industries that, 5 years from today, may experience the same problems that meatpacking and trucking are, and yet, because they do not anticipate those problems today, are not aware of the liability they face, or may simply be ignoring it.

Senator NICKLES. Or they may not have the lobbyists to put on enough pressure to get included on the list.

Mr. NAYLOR. That is valid, yes, sir.

Senator NICKLES. Gentlemen, I appreciate your input, and I would like to keep the record open, particularly in relation to the company problems that you experienced, Mr. Korody.

Mr. KORODY. Yes. Mr. Freirich is unable to be here, but Mr. Condon, to my right, is very familiar with that company, if you have any specific questions.

Senator NICKLES. I just looked at the tail-end of the statement in reading it, and he was hit with $640,000 in one of the plans.

Mr. CONDON. Yes. That is his estimate of what it would cost him in the consolidated pension fund of those employers in New York that I represent. I also represent that fund, so I am looking at the thing from both sides, from the problems of the fund and the trustees, as well as the employers.

We have a liability, from last best estimate—and I think these estimates are always pretty worthless——but the last best estimate we have is that a rule-of-thumb, withdrawal liability today out of our fund is probably $8,500 per employee. That would be a rule-of-thumb.

Senator NICKLES. What fund is this?

Mr. CONDON. The local 174 consolidated pension fund in New York City.

Senator NICKLES. That is a private fund?

Mr. CONDON. It is a multiemployer fund.

Senator NICKLES. I mean, not for public employees.

Mr. CONDON. Oh, no, no. It is the meat industry. Local 174 is a local of the Butchers' Union, which is part of the UFCW now. We call it "consolidated" because that local has contracts in various segments of the industry, and the segments negotiate separately. But ultimately, although apparently, many years ago, they may have had separate pension funds, they all came together, and they call it a consolidated fund. We have processors, we have wholesalers, we have kosher people, we have renderers, all contributing to the very same fund, all represented on the Board of Trustees, all with different ideas.

Senator NICKLES. I can imagine.

Gentlemen, we would like to keep the record open to ask you some additional questions later. I would like to proceed to the next panel and see if we cannot get through that before we have to run.

Thank you very much.

Our final panel includes Mr. Michael Rothbaum, president of the Harwood Cos., from New York; Mr. Kurt Bernard, who is executive director of the Federation of Apparel Manufacturers, also from New York; and we have Merrill Leviss, vice president of A. Soloff & Son, Inc., from Fall River, Mass.

Gentlemen, welcome. I do appreciate you being with us this morning.

Mr. Rothbaum?

STATEMENT OF MICHAEL ROTHBAUM, PRESIDENT, THE HARWOOD COS., INC., NEW YORK, N.Y.; KURT BERNARD, EXECUTIVE DIRECTOR, THE METZGER GROUP, INC., ACCOMPANIED BY JEROME KAUF, COUNSEL; AND MERRILL LEVISS, ON BEHALF OF A. SOLOFF & SON, INC., FALL RIVER, MASS, A PANEL

Mr. ROTHBAUM. I am president of and I am testifying in behalf of the Harwood Cos.

We employ about 1,000 people in this company, most of whom are members of the International Ladies' Garment Workers' Union pension plan, which is a defined contribution multiemployer pension plan under the legislation currently being considered.

Our company, as many in our industry, has been forced to liquidate several plants which have been certified by the Departments of Commerce and Labor as import impacted. These closings took place late in 1979 and early in 1980, some just days before the effective—and I might add, retroactive—date of the Multiemployer Pension Act. Fifteen hundred people were put out of work, who belonged to several unions. This was done under varying circumstances. We lost two-thirds of our net worth.

Had these plant closings taken place only weeks later, this law would have made us record additional liabilities, eliminating our remaining net worth, putting us completely out of business.

Cloudy accounting rules and SEC rules and some overzealous plan administrators may yet force us to record these liabilities, casting terrible uncertainty on our future. It makes no difference that at the time we were forced to take these actions, the law did not exist, creating an obligation we had not agreed to, a situation we had no knowledge of, denying us our right to due process. The thousand people who are gainfully employed today would be out of work, and a viable business entity would have been forced into bankruptcy.

It is equally ironic that if this happens, our unpaid liabilities would then have to be assumed by our fellow industry members who are parties to the ILGWU pension plan at a time when they too are battling for their economic lives.

Subsequent to the founding of the ILGWU plan, our company set up a pension plan for nonunion employees whose benefits were set at a level equal to or better than our union people would receive. These benefits have been increased as union benefits have been increased. The cost of this plan has averaged 3.5 percent of nonunion payroll during the last 3 years. During this same period, our contribution to the union plan has gone from 6¾ percent of union wages paid in 1979 to 7¾ percent in 1980 and 8¾ percent in 1981. This increase in contributions was used to increase pension benefits by 20 percent and pay for an increase in managenent fees and administrative expenses of 30 percent during this period. Increases of this nature in the face of a huge unfunded liability was a gross error in judgment on the part of the trustees of the plan.

There is something wrong when you compare the fact that our nonunion plan has similar benefits, a 50-percent lower cost, and is more than fully funded, with the fact that the union pension fund is $888 million in the hole—about $3,500 for every dues-paying

ILGWU member we currently employ, and the amount Congress says we are responsible for.

Last year, our company entrusted $425,000, or 2½ times our profit, to the managers of the union plan. Now we have been told that these managers "think" our liability may be 6 times our 1981 contributions, or 17 times our 1981 profits. And, even if this amendment is passed, the trustees tell us that they have the right to assess us with this liability.

As the shift to offshore production and nonunion shops without pension plans continues, and unionized firms, burdened by pension costs and huge unfunded liabilities making them less competitive continue to close, the base on which to assess this almost $1 billion deficiency decreases. Not only does the burden on individual unionized companies increase, but the unfunded liability increases per employer.

In the future, there will be fewer firms with weaker capital structures to ultimately fund this liability. How fair will it be when the few surviving unionized firms in our industry find they must fund the pensions for the entire unionized work force every employed?

What an equally cruel joke on those hundreds of thousands of employees depending on those benefits in order to sustain them through their retirement years.

I would like to commend Senator Hatch and the cosponsors of this bill for recognizing and focusing on this problem, but I am not sure this amendment goes far enough, because it really does not address itself to the need to fund this almost $1 billion deficiency. This is a burden that must be removed from the back of that segment of our industry which has already paid its obligation once, and is struggling for survival. I think the answer in part is that the burden must be shared by the unions, and if the unions' share must be borne by their membership, let that membership hold its leaders and trustees accountable.

This legislation must insure that those firms and their employees who have contributed their fair share—and by that, I mean every penny required under their collective bargaining agreements—are protected from losing their existence and their jobs by being assessed again by pension trustees without accountability, or a Congress which believes it can arbitrarily, and retroactively, tax an industry into insolvency and still protect the economic well-being of that industry's employees.

Thank you.

Senator NICKLES. Thank you, Mr. Rothbaum. We appreciate your comments.

[The prepared statement of Mr. Rothbaum follows:]

Statement

of

Michael Rothbaum, President

The Harwood Companies, Inc.

I am testifying on behalf of The Harwood Companies. We employ almost 1,000 people in the United States, most of whom are members of the International Ladies Garment Workers Union Pension Plan, a defined contribution multi-employer pension plan under the legislation you are currently considering.

Our company, as many in our industry, as been forced to liquidate several plants which have been certified by the Departments of Commerce and Labor as import-impacted. These closings took place late in 1979 and early in 1980, just three months before the effective -- and I might add, retroactive -- date of the Multiemployer Pension Act. 1,500 people were put out of work and we lost two-thirds of our net worth. Had these plant closings taken place only ~~months~~ [illegible] later, this law would have made us record additional liabilities, eliminating our remaining net worth, putting us completely out of business. Cloudy accounting and S.E.C. rules may yet force us to record these liabilities, casting uncertainty on the future. It makes no difference that at the time we were forced to take these actions the law did not exist, creating an obligation we had not agreed to, a situation we could have had no knowledge of, denying us our right to due process. The 1,000 people who are gainfully employed today would be out of work, and a viable business entity would have been forced into bankruptcy.

It is equally ironic that had this happened, our unpaid liabilities would then have had to be assumed by our fellow industry members who are parties to the ILGWU Pension Plan at a time when they too were battling for their economic lives.

Subsequent to the founding of the ILGWU Plan, our company set up a pension plan for non-union employees whose benefits were set at a level equal to, or better than, those our union people would receive. These benefits have been increased as union benefits have increased. The cost of this plan has averaged 3.5% of non-union payroll during the last three years. During this same period, our contribution to our union plan has gone from 6-3/4% of union wages paid in 1979 to 7-3/4% in 1980 and 8-3/4% in 1981. This increase in contributions was used to increase pension benefits by 20% and pay for an increase in management fees and administrative expenses of 30% during this period. Increases of this nature in the face of a huge unfunded liability was a gross error in judgment on the part of the trustees of the Plan. There is something wrong when you compare the facts that our non-union Plan has similar benefits, a 50% lower cost, and is more than fully funded, with the fact that the union pension fund is $888,000,000 in the hole -- about $3,500 for every dues-paying ILGWU member we currently employ, and the amount congress now says we are responsible for.

Last year we entrusted $425,000, or 2½ times our profit to the managers of the union plan. Now we have been told that these managers think our liability may be 6 times this amount, or 17 times our 1981 profits, and, even if the Hatch Amendment is passed, the trustees tell us that they have the right to assess us with this liability.

As the shift to offshore production and non-union shops without pension plans continues, and unionized firms, burdened by pension costs and huge unfunded liabilities making them less competitive continue to close, the base on which to assess this almost one billion dollar deficiency decreases. Not only does the burden on individual unionized companies increase, but the unfunded liability increases per employer. In the future, there will be fewer firms with weaker capital structures to ultimately fund this liability. How fair will it be when the few surviving unionized firms find they must fund the pensions for the entire unionized work force ever employed? What an equally cruel joke on those hundreds of thousands of employees depending on those benefits in order to sustain them through their retirement years.

This Amendment does not go far enough because it does not address the need to fund this almost one billion dollar deficiency -- a burden that must be removed from the back of that segment of the apparel industry which has already paid its obligation once, and is struggling to survive. The answer is that this burden must be shared by the unions, and if the unions' share must be borne by their membership let that membership hold its leaders and trustees accountable.

This legislation must insure that those firms and their employees who have contributed their fair share (and by that I mean every penny required under their collective bargaining agreements) are protected from losing their existence and their jobs by being assessed again by pension trustees without accountability, or a congress which believes it can arbitrarily -- and retroactively -- tax an industry into insolvency and still protect the economic well-being of that industry's employees.

Senator NICKLES. Mr. Bernard?

Mr. BERNARD. Thank you, Mr. Chairman.

I am here to take the place of Mr. Morton Metzger, who was scheduled to testify here this morning. Unfortunately, he was prevented last night, unexpectedly and beyond his control, from appearing, and I would like to offer his testimony in his stead.

Senator NICKLES. Thank you.

Mr. BERNARD. With me is Mr. Jerome Kauf, of the firm of Retzin & Kauf, the general counsel of the Federation of Apparel Manufacturers.

I am the executive director of the Federation of Apparel Manufacturers. This is Mr. Metzger's statement.

"Mr. Chairman and members of this committee"——

Senator NICKLES. It is not necessary to read the statement, because we have that, but if you would like to make a quick summary.

Mr. BERNARD. Certainly, I will. I would like to simply relate two experiences that Mr. Metzger would have entered into the record, because they perhaps deviate a little bit from some of the things that you may have heard here today, and then I would like to give you just a couple of additional comments.

The Metzger Group, the company that Mr. Metzger's firm goes by, while a very successful company, is like the apparel industry as a whole, extremely volatile. It is subject to the whims of fashion, as well as seasonal fluctuations in sales.

To cushion the risks, I—Mr. Metzger—always try to develop new lines so that if sales of one line drop, we can still compete in the marketplace.

Last year, a coat manufacturer, who then employed 50 to 75 people, approached me looking for additional capital and management skills. The company was a contributing employer to the ILGWU retirement fund, with a volume of around $3 million. According to a rule of thumb, withdrawal liability to the ILGWU fund runs at between 13 to 15 percent of sales volume or, in this case, about $400 to $450,000. Since, based on the company's volume of business, I believed its value was less than that figure, I simply decided against the investment—because of the withdrawal liability, obviously.

At about the same time—and this is experience No. 2—I was approached by a talented designer and an experienced salesperson, who had been in the ladies' suit business working for others and who were seeking capital to start a manufacturing venture of their own. Although the venture seemed promising, I feared that the new company's withdrawal liability would eventually exceed the value of the business, and that I would not be able to sell my interest at a later date. So I did not go into business with them, and to the best of my knowledge, what would have been a promising new business, creating jobs and tax revenues, never got off the ground.

Those are the two personal experiences that Mr. Metzger would have testified to. I, perhaps, would like on behalf of the 5,500 apparel manufacturers that are affiliated with our group, add two or three comments in general, if I may.

I have heard many comments put on the record here this morning, and I would say most of them certainly apply to our industry, as well, which is the women's and children's apparel manufacturing industry.

I heard about the difficulty, or perhaps even the impossibility, of selling, buying, merging businesses, of borrowing money, as a result of the withdrawal liability. I have heard very little about the fact that, in many cases, the business may actually constitute the pension the owner owns, the only pension that owner owns. It is his only retirement foundation. Without that business, there is no retirement left.

No. 2, something else which is very interesting, most of the apparel companies that we represent are very small companies. The net worth is very small—half a million dollars or less. In most instances, the withdrawal liability is not as we heard some people testify today, perhaps 30 or 40 percent of that net worth, but in most cases, it would be 100, 110, 120, 150 percent. If, for any one reason, they were forced out of business, or had to close down, they would not only give up their entire retirement, their own retirement income, but they might be in deep debt, to boot, at the age of 65, for all we knew.

And perhaps one other point which I should like to raise is that our industry is per se dependent, entirely dependent, on the wild, exorbitant fluctuations of fashion. Fashions change very, very rapidly. And of course, it is entirely common in our business, in our industry, to see companies leave the business and other companies coming in. And we also see very often that in the apparel industry, some companies see their volume drop by 70 percent or perhaps more in a year or to, only to regain the volume later on.

So these are all reasons why the withdrawal liability has descended, as we believe, with a vengeful force, certainly, on the 5,500 apparel manufacturers, all of whom are unionized.

Senator NICKLES. All?

Mr. BERNARD. All, 100 percent.

Senator NICKLES. Thank you very much.

[The prepared statement of Mr. Metzger follows:]

TESTIMONY OF
MORTON METZGER

Mr. Chairman, and members of this Committee, thank you for permitting me to testify.

My name is Morton Metzger. I am the President of the Metzger Group, Inc. in New York City, a manufacturer of women's coats. My company has been in business for over 70 years and employs as many as 200 people. I am also a member of the Board of the Federation of Apparel Manufacturers, which represents approximately 5,500 manufacturers of women's and children's apparel. All are bound by agreements with the ILGWU and all, including the Metzger Group, contribute to the ILGWU Retirement Fund.

I have come here today for three reasons. First, to urge the enactment of S.1748. Second, to tell you how the withdrawal liability provisions of MEPPAA have disrupted my plans for business expansion. And third, to relate to you how MEPPAA has brought incredible harm to all unionized women's and children's apparel manufacturers.

Permit me to describe the realities of my industry, on which these withdrawal liability provisions have descended with such vengeful force.

Most apparel manufacturers are small family businesses, operating with very little capital and heavily dependent on credit. The withdrawal liability created by MEPPAA impairs the small firm's ability to obtain credit, discourages new investment in the unionized sector of the apparel industry, and worse yet, virtually destroys the small owner's ability to sell his business at retirement.

Additionally, MEPPAA encourages existing apparel firms to resist unionization, simply to avoid withdrawal liability, and thereby creates a competitive disadvantage for firms like mine in the unionized sector.

Let me cite two personal experiences to illustrate MEPPAA's consequences for our industry.

The business of the Metzger Group, while successful, is, like the apparel industry as a whole, extremely volatile; it is subject to the whims of fashion as well as seasonal fluctuations in sales. To cushion the risks, I always try to develop new lines so that if sales of one line drop, we can still compete in the market place.

Last year a coat manufacturer -- who then employed 50 to 75 people -- approached me looking for additional capital and management skills. The company was a contributing employer to the ILGWU Retirement Fund, with a volume of around $3,000,000. According to a rule of thumb, withdrawal liability to the ILGWU Fund runs at between 13% to 15% of sales volume or, in this case, about $400,000 to $450,000. Since, based on the company's volume of business, I believed its value was less than that figure, I simply decided against the investment.

At about the same time, I was approached by a talented designer and an experienced salesperson, who had been in the ladies suit business working for others and who were seeking capital to start a manufacturing venture of their own. Although the venture seemed promising, I feared that the new company's withdrawal liability would eventually exceed the value of the business, and that I would not be able to sell my interest at a later date. So I didn't go into business with them; and, to the best of my knowledge, what would have been a promising new business, creating jobs and tax revenues, never got off the ground.

MEPPAA has, furthermore, endangered the continued survival of apparel manufacturing as an American industry. Producers are now moving "off shore" to manufacture goods which are then shipped back to the U.S. and sold in competition with American apparel manufactured in ILGWU shops.

The cost of labor is not the only, or even the most important reason for this movement. Yes, labor costs off-shore are substantially less than in the U. S., but there are substantial costs and risks in off-shore production that had previously dissuaded many unionized employers in the U.S. from importing. With MEPPAA's withdrawal liability now thrown into the balance, however, the advantages of operating off shore have become greatly enhanced. I believe no single greater incentive now exists for the shift of apparel manufacturing off-shore than the withdrawal liability MEPPAA imposes on unionized apparel manufacturers.

Apparel manufacturers have invested their lives and all or most of their resources in their businesses. They have played the game according to the rules, as "union shops", meeting "union standards." They have contributed to the ILGWU Retirement Fund to provide retirement income for their employees. But what about that employer, the small owner who has invested his life and financial resources in his apparel business? Who has nurtured his investment, often at a considerable personal and financial risk? Mr. Chairman, members of the Committee, he, too, is entitled to some consideration. He, too, is entitled to look forward to his retirement with some reasonable assurance that the value of his business, which in truth is his "pension," will be available to him. But the effect of MEPPAA, at least in the apparel industry, is to create a withdrawal liability that is often in excess of the net worth of the business, thereby wiping out the owner's only source of retirement income. This is unfair, unjust and ultimately will injure the very working people the law was enacted to protect.

For all these reasons, I urge that S.1748 be quickly passed and enacted.

Thank you.

Senator NICKLES. Mr. Leviss?

Mr. LEVISS. Senator, I am going to be very brief, because whatever has been said, I am only going to repeat.

I just want to say that A. Soloff is also in the apparel business. It is a small company. It was founded in about 1946, and in 1980, the company was buffetted after many years by imports, increased union advances, and high interest rates, and they lost approximately 30 percent of their assets, and they decided to close.

We had never heard of ERISA. Six months later, the union sent us a certified letter and a bill for approximately $215,000. They told us how they did this by their actuaries and all this stuff. We just could not believe it. I mean, we just could not believe that we could be penalized retroactively. It was just a very unfair piece of legislation and it penalized the people who contributed to the plan.

They were the ones who set the meter for this thing. The percentages were fixed by them, and we had no voice in whatever that pension plan did.

The only thing I would really like to say—and this also has been said before—is that Senator Hatch's bill is our only hope to correct this problem. It is the only way we can support the continuity of the business community, the labor negotiations and any ability to finance in anything.

I just do not believe that this can be done on an industry-type exemption. The withdrawal penalties set forth, I know will eat up any remaining assets that we have. We did not salvage very much out of this. This is a family business. And we may even have a little falling short.

But I think in the end, this whole thing is going to end up hurting the union. It is going to create the very situation they are looking to prevent.

I just think that the Hatch bill will help us all; it will help us to continue.

Thank you for the opportunity to say that.

Senator NICKLES. Thank you.

[The prepared statement of Mr. Leviss follows:]

STATEMENT OF MERRILL LEVISS ON BEHALF OF A. SOLOFF & SON, INC., FALL RIVER, MASS.

My name is Merrill Leviss. I am the Vice President of A. Soloff & Son, Inc., a corporation organized in 1946. When the Company was founded its principals were Abraham Soloff and Morris Freedman and it was primarily a family-owned and operated business. In the early days the Company employed approximately 60 employees and at no time since its founding has the number of employees exceeded 150.

The business involved the manufacture for resale of men's outerwear and the highest annual dollar volume of business achieved during the Company's entire history did not exceed four million dollars. Thus, for its entire operating life the Company was clearly a small business and was operated to provide a livelihood for its principals and for its employees. The business was managed prudently and until recent years was both modest in scope and successful.

In approximately 1975, for a variety of reasons, the business began to turn downward and by October of 1980 management was facing the decision to terminate manufacturing operations.

A. Soloff & Son, Inc. was the successor to a business conducted under the name of Freedman-Soloff Co. At least as early as March of 1946 that company had entered into a collective bargaining agreement with Local 177 of the Amalgamated Clothing Workers of America.

For many years, and, so far as records available to me indicate, at least as early as 1959, Freedman-Soloff Company had agreed to make contributions to the Amalgamated Cotton Garment and Allied Industries Fund which had been established to provide insurance and retirement benefits for members of the Clothing Workers Union. Basically, the collective bargaining agreements provided that each employer would contribute to the Fund on behalf of its employees a percentage of its gross payroll for covered employees. Over the years the rates of contribution and the terms of the Fund have varied, but throughout, Freedman-Soloff Company and its successor, A. Soloff & Son, Inc., continued to make payments to the Fund in accordance with its contractual obligation.

For the five years 1975 through 1979 the gross payroll of A. Soloff & Son, Inc. for covered employees was approximately as follows:

1975 - $590,000
1976 - $700,000
1977 - $731,000
1978 - $821,000
1979 - $690,000

For those same years the retirement contributions which were paid by A. Soloff & Son, Inc. to the Fund were as follows:

1975 - $16,800.00
1976 - $39,400.00
1977 - $40,900.00
1978 - $46,100.00
1979 - $38,600.00

For many years, because of the increasing complexity of collective bargaining negotiations and its limited resources, A. Soloff & Son, Inc., and many of the other parties to collective bargaining agreements with the Amalgamated Clothing Workers, participated in bargaining only indirectly. Negotiations were conducted by an organization known as the National Outerwear Bargaining Committee. The results were reported by the Committee to its members who then signed individual agreements. A. Soloff & Son, Inc. has never had any involvement with the management of the Fund or in the selection of employer representative Trustees. In effect, A. Soloff & Son, Inc., and the other small clothing manufacturers similarly situated, were simply notified of the results of collective bargaining and thereafter complied with them and made the periodic Fund contributions required of them.

The decision in October 1980 by A. Soloff to terminate operations was made basically because of the increased costs of production and the intense and destructive competition from imported goods which produced net operating losses for A. Soloff & Son, Inc. for four of the five years since 1975 and a substantial overall loss for the entire five year period.

At the time the decision to close was made, the Company was entirely unaware of the adoption of the 1980 Amendments to the ERISA statute. Moreover, the Company was entirely unaware that the Fund's assets, toward which it had been contributing for many years, might be said under some set of assumptions at some time in the future, to be insufficient to pay benefits at the rates which had been set solely by the Trustees.

In July 1981 A. Soloff & Son was advised for the first time by the Fund that it was liable under the 1980 Amendments to pay an amount which the Fund computed to be approximately $213,000. Subsequently, the Fund recalculated that amount on two different occasions. Most recently on December 2, 1981 the Fund recalculated the withdrawal liability to be $219,535.00.

Even applying the provisions of the 1980 Amendments which, I am told, were intended to reduce the impact of the assessment of withdrawal liability, our minimum annual payment has been set at $42,147. That amount substantially exceeds the retirement contributions which were paid by the Company for four of the five years 1975 through 1979 and very substantially exceeds the amount of any annual contribution by the Company for any year before then.

I hope that the Committee can understand the situation which the 1980 Amendments have created with respect to small and potentially declining businesses. A businessman is faced with a terrible choice. He must either determine to continue a losing business and, perhaps, wind down operations slowly so as not to cause a withdrawal, losing money all the while, or he must continue the business until events beyond his control such as insolvency intervene. In the latter case no-one's interests are served because any liability due to the Fund would be relieved by bankruptcy.

I want to emphasize that in our case, as in the case of many other small businesses, year after year we have paid all of our obligations to the Fund on the basis we agreed to and on the basis on which the Fund has assessed us. Now, having had to terminate operations we are faced with this ruinous additional liability which must be paid annually in accordance with the terms demanded by the Fund or, worse, upon default, paid in one lump sum.

It seems to me and to other small businessmen with whom I have talked, that the 1980 Amendments are highly unfair, and are even contrary to the interests of pension funds themselves.

The 1980 Amendments, in effect, relieve trustees of any responsibility for prudent management because they permit and require funds to assess upon businessmen who have conscientiously "paid their dues" year after year, liability for debts, defaults of others, mismanagement and miscalculations, and even for the generosity of trustees in declaring benefit rates in excess of the ability of their fund's assets to provide. Neither businessmen nor Congressmen, nor employees either for that matter, are accustomed to handing out blank checks but that is what the 1980 Amendments amount to for employers such as A. Soloff & Son.

It seems to me that the imposition of this sort of liability in and of itself will intimidate and persuade new employers against agreeing to participate in multi-employer pension funds. Moreover, in those union situations in which Fund participation necessarily accompanies union recognition, such as the garment industry, the prospect of this sort of liability will provide a powerful incentive to employers to resist efforts to organize their employees.

With respect to new employers, I have been told there are provisions in the 1980 Amendments which permit those who have recently joined multi-employer plans to terminate participation without paying full withdrawal liability. I do not think those provisions solve the problem for the following reason. The principle underlying the 1980 Amendments appears to be that Congress can alter, years after the fact, agreements of long-standing between employers and pension funds. It appears this can be done without regard for the reasonable expectations of employers or of trustees as to the amounts to be contributed. Worse, the liabilities imposed in A. Soloff & Son's case are wholly unrelated to any action or default of ours and are even unrelated to the actual cost of providing pensions to our own employees. If that principle is one which the Congress meant to enact in 1980 and means to leave in place, there is no way in which even a new employer can enter a multi-employer plan relying upon the provisions of the law as they presently stand. Obviously, if Congress considers that it has the power and that it is fair to alter contractual obligations and expectations, a future Congress need have no hesitation in amending even those protective provisions of the law and making those amendments retroactive. Thus, new employers who are concerned about the risk of incurring withdrawal liability cannot rely upon the protective provisions remaining unchanged once they have locked themselves into a multi-employer fund.

Without going too far into areas which are obviously reserved for lawyers, accountants and actuaries, I must say that I have been advised by my lawyer that the procedures established under the 1980 Amendments for contesting determinations made by trustees are heavily loaded in favor of the funds. Particularly, small employers who wish to challenge the determination of trustees are put to great expense to retain actuaries, whom they normally do not employ, and lawyers familiar with this specialized area of the law. Even with such expensive assistance it seems that the 1980 Amendments do not offer much prospect of an employer securing a redetermination of its liability through arbitration or the courts. It does not seem fair to me for the law to say that a fund, itself, can establish the amount which it claims to be due and force me to pay that amount without giving me an even chance to convince an impartial arbitrator or judge that the amount should be different. I am told that the 1980 Amendments instruct arbitrators to resolve any questions as to the reasonableness of the actuary's assumptions in favor of the fund, even though there is a genuine difference of opinion among experienced actuaries as to the appropriateness of the particular assumptions used by the fund, and even though based upon the facts, an impartial arbitrator or judge would have reached a different result.

In short, the 1980 Amendments seem to me to be both unconscionable and self defeating. Perhaps in the case of a businessman it is difficult for the general public to realize, but we must appeal to you to see that the 1980 Amendments create very serious problems which were not anticipated when they were adopted. At first they may seem to be problems for businessmen alone, but I am afraid that as more businesses become more aware of the financial hazards of participating in multi-employer plans under the 1980 Amendments there will be a sharp drop off in small businesses becoming contributing employers and that could bring about the very conditions which Congress may have thought it was helping to safeguard against. In short, Congress should not hesitate to rethink the 1980 Amendments in the light of experience to date. I and others like me feel we have been unjustly burdened by an obligation we had no reason to expect nor opportunity to provide for, and without fault or ommission on our part. I urge this Committee to consider the impact of the 1980 Amendments upon small businessmen such as myself and to take steps to resolve the problem.

Senator NICKLES. Mr. Leviss, has your firm actually closed?

Mr. LEVISS. Yes; we are closed. We closed November 7, 1980.

Senator NICKLES. Did anybody pick it up? Did anybody buy it?

Mr. LEVISS. No. We went into liquidation. We continued through 1981 and compounded our losses, leaving ourselves with our inventory. But that was a skeleton operation.

Senator NICKLES. What happened to those employees? I saw where you said you went up to 150 at one time.

Mr. LEVISS. Well, in Fall River, Mass., there is a great shortage of needle operators. These people were just being absorbed as rapidly as we let them go.

Senator NICKLES. Were they continuing to work with groups that were also covered by the same union?

Mr. LEVISS. Amalgamated Clothing Workers.

Senator NICKLES. Is that the same union that you are under?

Mr. LEVISS. Yes.

Senator NICKLES. ILWU?

Mr. LEVISS. No. We are Amalgamated. I think someone here spoke about International———

Senator NICKLES. Mr. Rothbaum, a couple of questions. Your statement went into some detail, which I appreciate, on the status, I guess, or the financial situation of the unions. Have you been able to get any information on the financial status of the Garment Workers' Union Pension Fund?

Mr. ROTHBAUM. Yes. We have been able only to secure information detailing what the unfunded liability is, what the total asset values of the various plans are. We have made requests to the trustees of the union for more information, and were met with a general reluctance to divulge that information—not that there was an outright refusal, but there would have to be conversation and approval before we would have access to any further detailed information.

Senator NICKLES. Could you provide this committee with some of the information that you have? I think I saw something like $888 million of unfunded liability; is that right?

Mr. ROTHBAUM. That is for the ILG plan, yes.

Senator NICKLES. Could you provide that to our committee?

Mr. ROTHBAUM. Surely.

[The following was received for the record:]

MULTIEMPLOYER PENSION PLANS - FUNDS STATUS FOR WITHDRAWALS

Amalgamated Clothing and Textile Workers Union

1/ Clothing Fund: 1980 withdrawals

Unfunded Vested Liabilities	$441,289,200
Assets	$ 63,800,000
Five Year Contributions	$150,466,243

2/ Cotton Fund: 1981 withdrawals

First Step:

Unfunded Vested Liabilities		$126,850,403
Assets		$207,000,000
Five Year Contributions (1975-79)		$112,346,831

Second Step:

Unfunded Vested Liabilities	(-)	$ 4,188,040*
Five Year Contributions (1976-80)		$130,089,986

International Ladies Garment Workers Union: 1980 withdrawals

Unfunded Vested Liabilities	$887,914,500
Assets	$270,000,000
Five Year Contributions	$530,500,000

* This represents a net surplus. Thus the "1980" liabiity developed from the data in step 1.3 reduced by subtracting the "adjustment" developed from the data in step 2.

Formula:

$$\frac{\text{firm contributions ('75-'79)}}{\text{fund contributions ('75-'79)}} \times \text{UVL; } \underline{\text{less}}\ \frac{\text{firm contributions ('76-'80)}}{\text{fund contributions ('76-'80)}}$$

Senator NICKLES. You mentioned that you had 1,500 people out of work, and that was back in 1980?

Mr. ROTHBAUM. The end of 1980 and 1979, under varying circumstances. Some of these plants that we liquidated were actually sold. I can detail to you a horrendous and bizarre situation we may be confronted with now, but no claim has been assessed; we have just been put on notice that a claim may be assessed.

Senator NICKLES. Well, this is the point I am getting to. Out of that 1,500, assuming some of them were——

Mr. ROTHBAUM. An example would be that, we had a plant which was operating under the contract with the Amalgamated Union back in 1980. This took place in July. The assets of this company, with the exception of the building, was sold. Along with the assets went 20 Amalgamated Clothing Workers employees. The new entity signed a contract, guaranteeing those employees the same vested benefits with the Amalgamated plan as they had under our plan. No claim was made by the union or the pension trustees. However, the union came to us and prevailed upon us to keep one employee on, because he was going to retire in November of 1981, and it would be helpful to him if, under our old contract, he continued on until his 62d birthday to be fully vested. We agreed, and we made him a maintenance man in this building that we still had that had not been sold as part of the assets. We rented that building and we were obligated to take care of it.

In January 1982, the building was sold by the landlord; the maintenance man was terminated, and as such, retired, because he had been vested in the plan, and the union claims we owe them $520,000 as our share of the unfunded liability of the plan.

Senator NICKLES. For how many people?

Mr. ROTHBAUM. For 20 people.

Senator NICKLES. For 20 people?

Mr. ROTHBAUM. Well, you must understand that——

Senator NICKLES. How many active employees?

Mr. ROTHBAUM. At the time of the effective date of the act, which was April 29, we had 20 active employees. However, prior to that date, back in November 1979, before the act came into being at all, we had almost 300 employees in that plant. And that plant had, because of imports, been one of the plants that was certified and was just decreasing in population. In terms of computing the unfunded liability, though, the union goes back over 5 years' contributions, taking into account the contributions that were made for almost 300 employees during that prior period, even though there was no termination at that point because the act was not in effect.

Senator NICKLES. I see.

Mr. ROTHBAUM. So my point is that for the termination of one employee who, in fact, retired and was not terminated, we may be confronted—we are not sure yet whether this claim will be asserted, but it certainly has been raised—with a $520,000 liability.

Senator NICKLES. What impact does that have on you? We have heard other witnesses just recently testify that they would certainly recommend if they were in that situation to get out of the multiemployer plan as rapidly as possible.

Mr. **Rothbaum**. Well, the problems become more complex and more immediate. For example, we are in the process of issuing a financial statement which must go to the SEC by March 31. With this cloud, our accountants are insisting we put a footnote to that statement that this may be a liability. Our lawyers, because of a lack of precedent and legal testing in the situation, are unable to voice an opinion as to whether we might prevail. The accountants are therefore talking about the possibility of a qualified opinion which, under our covenants with our institutional lendors and their agreements, would force an acceleration of our term debt, which in turn would force an acceleration of our short-term debt with our bank lendors, which in turn would put another thousand people out of work and increase the unfunded liability to the ILG plan, quite possibly, $3 or $4 million more.

This, at times, becomes a very immediate problem and one cannot look to administrative remedies or even the passage of this amendment to take care of the problem.

Senator **Nickles**. That brings me to the other point you made in your statement. You thought maybe this bill, as proposed by Senator Hatch, might not go far enough. Then you said something else about trying to recover the moneys. Could you expound on that just for a second?

Mr. **Rothbaum**. Well, my own personal thoughts are that while we can put the problem in its proper perspective in terms of collective bargaining and the fact that our obligations have been fulfilled and we have no liability, we have got some 300,000 or 400,000 people out there whose pensions are in jeopardy, and in some way, there is an obligation to seek a method and a remedy and a way of funding them.

I alluded earlier in my remarks to the fact that in this plan during this period, this past 3 years, certainly, when legislation became contemplated, certainly, when the extent of the unfunded was well-known; to have increased benefits was just a ludicrous and bizarre situation——

Senator **Nickles**. And that did happen?

Mr. **Rothbaum**. Yes. Benefits were increased by 20 percent during this period.

Senator **Nickles**. Benefits were increased 20 percent during that period, even though the unfunded liabilities were enormous and growing?

Mr. **Rothbaum**. Right.

Senator **Nickles**. We would very much appreciate your staying in contact with us, particularly in view of the fact that your situation is still flowing, and keep us apprised of what your situation is. That would be helpful to us in following the impact.

Mr. Bernard, just one quick question, and Mr. Leviss, I will include you in this question, too. Basically, your statement is that trying to come up with a few independent exemptions is not the right direction for this committee to go—or it should be more broad-based?

Mr. **Bernard**. Well, Senator, I believe that it is very difficult to answer this question. I know that our attorneys at the present time are exploring the possibility of perhaps making an application to the PBGC to correspond to provisious in the Multiemployer Pension Plan Amendment Act that would make such exemptions possible.

Mr. LEVISS. Well, I go back to the original point. First of all, the constitutionality of the original bill escapes me. We are attacking the constitutionality of it—how can contractual agreements be set aside. There was never any provision to provide any of these things which we are now being penalized for.

As a matter of fact, even though there was maybe union representation at the hearings, we certainly knew nothing about it, and I checked here today, and most of the people, a good many of the people who have testified, did not even know about it until it happened. And then, all of a sudden now, the cost, because the penalty is extreme. I was looking at some of my figures. The last 5 years they based this on—we paid $185,000. We have been paying since 1959, and evidently, they see withdrawal liability of about $230,000. I do not know. It just does not seem to have a solution when you go into exempting an industry, because each industry—the truckers say they should be exempt, the meat workers say they should be exempt, the grocers say they should be exempt. Everybody is going to tell you of fluctuations in your business; we all have them. But the solution will not come in the exemption.

Senator NICKLES. Gentlemen, I appreciate your comments. We will keep the record open, and probably either myself or other members of the committee will request additional information from you. Thank you very much.

We will adjourn this meeting and will follow up with representatives of other interested parties on the 17th, to finish consideration of S. 1748.

The meeting is adjourned.

[Whereupon, at 12:25 p.m., the subcommittee was adjourned.]

MULTIEMPLOYER PENSION PLAN STABILIZATION ACT OF 1981

WEDNESDAY, MARCH 17, 1982

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, D.C.

The subcommittee met, pursuant to notice, in room 4232, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles and Cohen.

OPENING STATEMENT OF SENATOR NICKLES

Senator NICKLES. Good morning.

I am glad to see Senator Cohen is with us again. We appreciate your assistance today.

We will begin the second day of hearings on S. 1748 and also hear other ideas and suggestions from interested parties for seeing if we cannot make some changes concerning multiemployer pension liabilities as they have come before us.

Last week we had a list of panelists primarily from the employer's side, most of which stated a very strong desire to see some changes made; if it is not S. 1748, then some other possible changes.

Today, we have another group of informative, and I think, interesting panelists, that will share with us their views and opinions on the need for some changes concerning the Multiemployer Pension Act Amendments, as they were made in 1980.

Senator Cohen, do you have any opening remarks or anything that you wish to state?

Senator COHEN. No.

Senator NICKLES. On our first panel we have former Senator John Culver and Ted Groom. Gentlemen, I will open it to you. I might mention to all of our panelists today that we will be entering your remarks in their entirety as if read, so you can summarize if you wish, and please proceed.

STATEMENT OF HON. JOHN C. CULVER, ESQ., WASHINGTON, D.C., CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS; THEODORE R. GROOM, ESQ., WASHINGTON, D.C., THE WESTERN CONFERENCE OF TEAMSTERS PENSION FUND

Senator CULVER. Thank you very much, Mr. Chairman, and Senator Cohen.

My name is John Culver, and I am a partner in the Washington, D.C., law firm of Arent, Fox, Kintner, Plotkin & Kahn.

Mr. Chairman, Mr. George Lehr, the executive director of the Central States Southeast and Southwest Areas Health and Welfare and Pension Funds, had planned to appear here today to present this testimony on behalf of the Central States fund, but he was required to remain in Chicago today for a trustees meeting, and he has requested that I extend his apologies to you and present his testimony today on his behalf.

Senator NICKLES. Well, we are pleased to have you, Senator, before this committee.

Senator CULVER. Mr. Chairman, I appreciate very much the opportunity to offer this testimony before the Subcommittee on Labor concerning S. 1748, the Multiemployer Pension Plan Stabilization Act. In addition, I would like to commend both you, Mr. Chairman, and Chairman Hatch for the leadership that you have evidenced in addressing problems which have arisen in this very important part of the pension law.

I endorse your views that the vital importance of the ERISA and MEPPA laws mandates a legislative review of problems which have arisen in their implementation. Congress should not be adverse to midcourse corrections which are indicated by the recent experience multiemployer plans have had under these statutes.

Our pension fund is one of the largest multiemployer pension funds in the country. At the present time, the fund has approximately 340,000 active participants and receives contributions on their behalf from approximately 13,500 employers. An average of $35 million per month is paid in benefits to approximately 99,000 retirees and their dependents.

The provisions of S. 1748 would provide for the elimination of title IV coverage in respect of all multiemployer plans other than those relatively few arrangements created as part of collective bargaining agreements in which specific benefits are negotiated, rather than just the employer's contribution requirement. The removal of title IV coverage, Mr. Chairman, does away, of course, with PBGC insurance coverage, as well, and also eliminates the controversial feature of employer withdrawal liability.

The early implementation by our pension fund of a comprehensive employer withdrawal liability collection program has placed our fund on the cutting edge of current experience in this area. I wish I could report to the committee that our experience with withdrawal liability has been favorable and has served to strengthen the fiscal position of our fund. Unfortunately, Mr. Chairman, this has simply not been the case.

The law has directed us to attempt to collect withdrawal liability in order to meet our fiduciary obligations. We have established a basic program at a very substantial initial cost to identify employers that have potential withdrawal liability and the amount thereof.

To date, we have identified approximately $130,549,000 of unfunded vested benefits allocable to employers which have withdrawn from the fund. Of this amount, an estimated $75,746,000 is attributable to employers which have already filed claims in bankruptcy. While I do not feel it appropriate to discuss in detail the current status of pending litigation, I am personally not optimistic of the likelihood of collecting a large portion of this amount.

Our recent efforts to collect withdrawal liability from solvent employers have met with continuing opposition, including complex challenges regarding the constitutionality of the Multiemployer Pension Plan Amendments Act of 1981.

At the present time, there have been 12 lawsuits filed against the fund in this area and 2 lawsuits filed by the fund. We anticipate that an additional 20 lawsuits may have to be filed by the fund in the near future. Our legal fees, which have been substantial to date, will continue to grow at an alarming rate.

In spite of our enormous investment in legal fees, time and effort, we have succeeded in collecting only $217,491 to date. Our experience has obviously been very disappointing and is requiring us to properly reevaluate the scope of our collection program in light of the low cost-benefit ratio.

In addition, Mr. Chairman, to a net drain in fund assets, the present system of withdrawal liability has hurt us in yet another way. The fear of withdrawal liability haunts employers currently in the program and has hampered our efforts to expand our contribution base through new employers.

The fund experiences a periodic withdrawal of employers due to normal fluctuations in the marketplace. The fund's lifeblood, however, depends on its ability to attract new employers into the plan to replace the natural attrition that we experience.

I am very fearful that the concerns regarding withdrawal liability, such as those reflected in an article appearing in the Wall Street Journal on March 5, 1982, which I respectfully request be made a part of this statement at the conclusion of the statement, Mr. Chairman——

Senator NICKLES. All right.

Senator CULVER [continuing]. Will make it increasingly difficult to negotiate new employers into our fund.

Moreover, the fears of employers in the trucking industry are compounded by the recent deregulation program which the Congress has imposed. Employers are presently having to face the implications of this industry deregulation and must have the flexibility to merge, consolidate or sell their operations.

The practical constraints on asset sales due to withdrawal liability greatly impair the capacity of the private sector to make the required market adjustments in the interest of a healthy economy.

We could go into some detail as to the adverse experience which the fund has suffered to date in its attempts to implement a comprehensive withdrawal liability program. However, Mr. Chairman, I would like to acknowledge that I recognize the concerns of those that oppose a complete elimination of withdrawal liability and the insurance structure which accompanies this liability.

The Central States Pension Fund is very large and can absorb a temporary constriction in its contribution base. On the other hand, there are a number of local funds which depend upon an uninterrupted flow of employer contributions in relatively narrow geographical areas. These funds may not be able to survive in times of industry hardship and the removal of benefit insurance which the present bill contemplates may not be in their best interests.

In addition, Mr. Chairman, the total elimination of withdrawal liability could give employers incentive to restructure their operations in a fashion which would enable them to avoid their responsibility to make contributions for the pension benefits of their employees.

The Central States Pension Fund has actively explored alternative approaches to addressing current concerns with the title IV program. Our counsel have met with a number of interested groups, in particular, with counsel to the Western Conference of Teamsters Pension Fund, and I believe that Mr. Groom will testify as to the nature of some of the suggestions that we have mutually developed in this area.

At this time, I would like to state that it is the position of the Central States Pension Fund that a total elimination of the insurance system may not be appropriate for all members of the multiemployer pension plan community and that relatively modest—relatively modest modifications to the present system can respond effectively to the problems that both management and labor have described in the course of these hearings.

Particularly, I would suggest, Mr. Chairman, changes to the present exemption for certain plans covering employees in the trucking industry. Plans that have an asset to benefit ratio of at least, for example, 5 to 1, should be allowed to limit withdrawal liability procedures to situations where the employer is attempting to transfer its ongoing assets to a nonunion operation or to otherwise evade its contribution responsibilities while enjoying the benefit of continuing operations.

For qualifying plans in the trucking industry, a normal insolvency or sale of assets to another union operation should not trigger potential withdrawal liability problems.

In addition, Mr. Chairman, I would request that the present exemption discretion that is granted to the PBGC be legislatively broadened to make it clear that the PBGC has authority to waive withdrawal liability in its entirety for any multiemployer plan upon a showing that such a waiver would not be adverse to the interests of plan participants. Again, withdrawal liability is a vehicle that may be appropriate for some plans, and not for others.

Finally, I would respectfully suggest that the present sale of asset rules which have proven to be very burdensome be significantly modified for all multiemployer plans so as to more closely parallel the present rules concerning the sale of stock.

In conclusion, Mr. Chairman, I wish to thank you very much for this opportunity to share our views and experience with you on this occasion. The incorporation of the approaches which we have offered today will, in our judgment, successfully achieve the desired goal of affording some meritorious relief in this area while at the same time preserving the viability of the pension insurance system for the benefit of plan participants.

I believe the testimony prepared on behalf of the Western Conference of Teamsters pension plan will further elaborate on this point.

[The article referred to follows:]

Liability Bills

Law to Protect Multi-Employer Pensions Is Causing Hardship for Many Businesses

By JOANN S. LUBLIN

Staff Reporter of THE WALL STREET JOURNAL

Edward Riss won't easily forget how shocked he felt when his family-owned concern was billed for $16.7 million, more than double its net worth.

The Teamsters Union's Central States Pension Fund demanded the money last June from Republic Industries Inc., a Kansas City holding company, because a trucking subsidiary had gone out of business and dropped out of the pension plan.

"Please make your check payable" to the central-states fund, the billing letter read. "Isn't that a great line?" ruefully asks Mr. Riss, Republic's president. "We carry that around with us all the time." He adds, "We felt that the entire situation was totally ludicrous."

Mr. Riss's "totally ludicrous" situation results from a 1980 federal law intended to shore up shaky multi-employer pension plans through stiffer penalties for companies that quit them. Some 2,000 such plans negotiated by unions and employers provide retirement benefits to about eight million Americans in trucking, construction, coal, food-retailing and other industries.

Hit by a Wild Card

But the well-intentioned legislation is causing hardships and even havoc for many businesses nationwide. Employers that buy, sell, move or close operations find themselves saddled with millions of dollars in sometimes unexpected pension liabilities—money that was to be paid to retirees over periods of many years. Some, such as Republic, owe their multi-employer plan more than they are worth. A few proposed mergers have collapsed. Other corporations see increased borrowing problems because accountants are starting to demand that balance sheets list their potential pension liabilities.

"I've never gotten so much heat on any one issue. The employers are coming to us in droves, with bitter, bitter complaints" about the 1980 law, says Michael Romig, the U.S. Chamber of Commerce's employe-benefits director. "Companies can't operate normally because this wild card hits them."

The chamber, which fought for the legislation, now wants to revamp it. About 25 other business groups are lobbying intensively for a Senate bill, sponsored by Utah Republican Orrin Hatch, that would exempt most employers from the act's main provisions. Mr. Hatch, the Senate Labor Committee chairman, opens hearings next Thursday in what may be the first salvo of a broader and protracted congressional battle over the nation's private-pension policy.

At the same time, more than 60 pending lawsuits, mostly directed against pension funds, attack the complex law as unconstitutional under the due-process clause. Companies contend that although they agreed to contribute to a pension fund, they never bargained with unions over responsibility to pay any specific retirement benefits. That responsibility, they say, is the fund's.

Congress passed the multi-employer bill in 1980 after these pension plans belatedly came under the jurisdiction of the 1974 Employe Retirement Income Security Act, or ERISA, which guarantees payment of workers' promised pensions. With the benefits thus ensured, experts worried that a slew of employers would drop out of the plans because a significant number of companies were in poor financial shape. Such a stampede could have led to mass pension-plan failures and the eventual bankruptcy of the Pension Benefit Guaranty Corp., the federal agency that insures pension funds.

Tough Provision

To discourage an employer exodus, the 1980 legislation imposed a tough "withdrawal liability" on most concerns that leave multi-employer plans. Such corporate dropouts must pay the funds at least a share of the money their employes have coming to them in future retirement benefits. A demand for payment can be triggered by seemingly irrelevant matters, such as an aging business owner's desire to liquidate and retire.

Willett Motor Coach, a Chicago bus company, recently laid off 404 of its 435 drivers after losing a major school-board contract to a nonunion rival. The loss of the contract—and poor prospects for rehiring the drivers—means that Willett may have to pay a local teamsters' pension fund up to $2.6 million in withdrawal liability over the next three years.

"Attila the Hun was a nice guy compared to ERISA. He didn't steal nearly as much property," rages David Howell, the chairman of Willett Inc., which owns the bus company. Like many employers, he signed labor contracts that concentrated on his cents-per-hour pension-fund contributions; he thought his obligation ended with those monthly payments. "We aren't against pensions," Mr. Howell continues. "We're against having our assets plastered with a lien we didn't contract for." He may sue.

Judges Block Collections

A number of federal judges have blocked multi-employer plans from collecting millions of dollars in withdrawal liability while the courts review employers' legal challenges. Some pension plans' current inability to collect the money could endanger their financial health.

The teamsters' central-states fund has dunned 185 concerns for $150 million because they stopped participating in the plan. The biggest assessment was the $16.7 million one received by Republic Industries after Johnson Motor Lines went out of business. Republic has refused to pay and is suing the fund. Other employers have paid the central-states fund a mere $191,000 so far. The plan's "unfunded vested liabilities," the difference between its assets and the benefits owed eligible workers, now exceed $4 billion and are climbing.

"In theory, it's a wonderful law; in practice, it doesn't work," says George Lehr, the executive director of the central-states fund. "In the long run, employer liability is the single most damaging thing pension funds will be facing."

The mere threat of withdrawal liability has upset many business deals. Metzger Group Inc., a New York maker of women's fake-fur coats, recently canceled a planned acquisition of a small wool-coat manufacturer to avoid assuming that company's liability. For similar reasons, Metzger has begun making women's suits in Hong Kong instead of New York. "We're a family company. I could be wiped out by the (liability) payments," explains Morton Metzger, the president of the group, which his father began 72 years ago. "Given a choice, it might have been different. I never had a choice."

Though the buyer of a company sometimes takes on the withdrawal liability, in other cases the burden falls on the seller. In still other instances, buyer and seller may share the liability. The basic decision is up to the trustees of the pension fund to which the acquired company belongs.

A Deal Falls Through

The prospect of taking on $25 million or more in pension liability killed a trucking merger and cost one major trucking company some customers and employes. Last March, TIME-DC Inc. of Lubbock, Texas, announced the sale of its assets to East Texas Motor Freight Lines of Dallas for about $20 million. Two months later, the deal fell through because of confusion about the buyer's pension liability. In the uncertain interim, sales plummeted and several dozen key management and sales people quit. TIME-DC largely blames the collapsed sale for a $6 million pretax loss last year. "There's no use to look" for another buyer "as long as we have that law on the books," says Hugh Shurtleff, the concern's president.

Some business owners are "cannibalizing" themselves into bankruptcy rather than liquidate unprofitable operations and face steep pension-plan withdrawal payments. "You just sit there and continue to lose money until you're broke. You eat your assets," explains Willet's Mr. Howell. He says he knows of two small Chicago truckers following this course, but he won't identify them.

The 1980 pension law is having other reverberations. To bolster multi-employer plans' financial footing, more business executives are rejecting union-proposed increases in retirees' benefits and demanding a greater voice in running the plans. In addition, fewer big companies are joining such funds; some resist union organizing drives more strenuously or else offer unionized workers profit-sharing plans as an alternative.

Achievement of Goal Seen

"Locals say, 'We can't get anybody to come into the fund,' " reports Jack Yarborough, the operating director of the Teamsters' central-states fund. Actually, more concerns did join than quit the fund between July 1980 and last January, but the new ones employ 7,661 fewer workers than did those departed. Pension experts fear that the trend eventually could lead to the demise of the multi-employer plans, which currently control about $50 billion in assets.

Proponents of the 1980 law insist that despite some flaws, it has achieved the goal of protecting existing pension funds by discouraging employer withdrawals. Because Congress assured workers of their pensions, "you then have the old question of who's going to pay for them," says Gerry Cole, as-

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sistant executive director of the Pension Benefit Guaranty Corp., or PBGC. "The old answer," he goes on, "is, 'Not me.' "

He thinks it is unfair to stick participating employers with pension obligations left by departing companies; that makes stiff withdrawal liability "the only rational system." Robert Nagle, the agency's executive director, adds, "Everybody recognized this was a painful solution, but it was the only one anybody was able to come up with."

To ease liability burdens, the PBGC may grant certain exemptions this spring for employers in the trucking, longshore and other industries. The law already exempts most construction-company withdrawals from liability because of the industry's mobility.

The International Ladies Garment Workers Union hopes the PBGC will permit its multi-employer plan to exempt the small entrepreneur who simply wants to sell his business and retire. "He's tired, he wants to quit, or he has had a few bad seasons and feels another bad season would wipe him out," observes the union's president, Sol Chaikin. "My own feeling is that it would be cruel and unusual punishment for our union pension fund to demand his unfunded liabilities going back 20 years. That would leave him without a penny."

Will such exemptions suffice? The law's critics think the exemptions would offer employers too little too late, so they want Congress to overhaul the law. But Mr. Chaikin, like many who pushed for the 1980 measure, can't decide whether to support the Hatch bill, which would exempt most employers from withdrawal liability. Despite his sympathy for some business owners, Mr. Chaikin worries about "the maintenance of our members' retirement fund" without the liability. Senate staffers believe that the garment workers and the teamsters' union will endorse the Hatch proposal, but without much fanfare.

Another union leader will fight hard to defeat Sen. Hatch's bill. Robert Georgine, president of the AFL-CIO Building and Construction Trades Department and the guiding force behind the 1980 legislation, argues, "The cure he is proposing might kill the patient."

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Senator NICKLES. Thank you, Senator Culver. We appreciate your input.

Mr. Groom?

Mr. GROOM. Mr. Chairman, my name is Ted Groom. I'm a member of the Washington, D.C., law firm of Groom & Nordberg.

I am here today on behalf of the Western Conference of Teamsters Pension Trust Fund. With about 600,000 active and retired participants working for 16,000 employers in 13 Western States, the Western Conference plan is the largest multiemployer plan in the United States.

We have been involved in the debate over withdrawal liability and the PBGC insurance program since early 1977. At that time, the PBGC reported to Congress that the multiemployer insurance provisions enacted in 1974 were unworkable and could lead to the imposition of an $80 per participant annual insurance premium.

We were alarmed by these projections and concerned that the Western Conference plan could be required to pay millions of dollars in premiums every year to the PBGC, but get nothing in return because our plan is healthy and solvent.

A principal aspect to the PBGC's solutions to these problems was to propose that employers that leave multiemployer plans be required to pay for a portion of the unfunded benefits that they leave behind, in the form of withdrawal liability.

Throughout this debate, the Western Conference plan was the most outspoken opponent of the proposed multiemployer insurance system. We urged the Congress to consider much more modest alternatives to the proposed program.

However, when these efforts failed, we felt that if the Congress was going to adopt a sweeping benefit guarantee program, the program should include features designed to protect healthy plans such as ours from having to pay the benefits that were promised by other plans.

Thus, we supported a form of withdrawal liability, although a much more limited form than is currently in the law.

Since the Multiemployer Act was signed into law 18 months ago, the focus of concern has shifted from the possible bankruptcy of the PBGC to the adverse, sometimes disastrous, effects that withdrawal liability has had on some employers that have withdrawn from multiemployer plans.

The PBGC has been amply protected by the new insurance system, but many employers feel that they have not been.

Mr. Chairman, we did not want this system in the first place, so we are not at all insensitive to the harm that has befallen employers and others as a result of it.

Thus, both the employee trustees and the employer trustees of the Western Conference plan urge the Congress to take appropriate legislative action to address the problems that have developed under the withdrawal liability rules of ERISA. Although our trustees are not in agreement on exactly what form an amendment to ERISA should take, I would like to outline for you the two legislative approaches that are currently supported by our trustees.

Our employer trustees and our employee trustees had a difference of opinion on this, and one person remarked to me that "That's not so bad. It's not too bad to be schizophrenic. After all, if you aren't schizophrenic these days, you aren't thinking clearly." [Laughter.]

Our employer trustees favor the approach taken in S. 1748, and share the concerns expressed before this subcommittee by, among others, witnesses for the American Trucking Association.

They feel that the system for multiemployer plans should, in effect, be eliminated because, on the one hand, it is harmful to the Western Conference plan and, on the other hand, it is highly unlikely ever to provide any benefit to our plan.

The current program is harmful to our plan because it requires premium payments from our plan of hundreds of thousands of dollars a year, and because it imposes unnecessary withdrawal liability on employers.

Our employer trustees have also concluded that withdrawal liability is unfair to current employers and a serious deterrent to new employers entering the plan.

They also feel strongly that many of the problems caused by withdrawal liability will persist if withdrawal liability is merely reduced rather than eliminated altogether.

In addition, they feel that if any form of liability is continued, employers will still face substantial uncertainty as to the amount of their potential liability. This lack of control over the amount of potential withdrawal liability frustrates rational business planning and also encourages employers to avoid multiemployer plans.

Our union trustees also favor broad relief from withdrawal liability, but they do not support the approach taken in S. 1748. I think our union trustees have taken a position which is consistent with the position that Senator Culver has referred to.

They tend to assume that Congress will not repeal the benefit guarantee program for multiemployer plans, and thus that there will continue to be a need to protect the insurance system in order to keep premiums at a reasonable level.

In addition, our union trustees fear that the 1980 act has created so much anxiety about multiemployer plans that employers could abandon these plans in large numbers if Congress did repeal the benefit guarantee program and withdrawal liability.

Thus, our union trustees favor continuing some form of withdrawal liability, but their principal concern involves cases in which the withdrawal is a selection against the plan or otherwise directly harms the plan.

They believe it would be appropriate to amend ERISA to provide for an automatic and retroactive reduction in withdrawal liability under most plans involving the Teamsters Union.

In addition, they favor expanding the authority of the PBGC to approve the reduction or elimination of withdrawal liability under any plan. Finally, our union trustees favor changes in ERISA's asset sale rules to remove impediments to ordinary business transactions.

Mr. Chairman, I would like to outline each of these proposals for you briefly. It is really a proposal that is divided into three parts. The first part pertains solely to multiemployer plans that involve the Teamsters Union.

With respect to such plans, our union trustees favor an amendment that would bring automatic and retroactive relief from withdrawal liability in most cases. This would be accomplished by applying to all employers in these plans a withdrawal liability exception similar to the one that now applies in the construction industry.

Under this approach, an employer would generally be exempt from withdrawal liability in the following cases: First, where the employer transfers its operations outside of the area covered by the plan; second, where the owner of the business dies or retires, and the business ceases; third, where the business goes bankrupt and ceases; fourth, where the business ceases temporarily; fifth, where the employer sells its assets, except where all or mostly all of the employer's assets are sold to a buyer that continues operations nonunion in the area; and, sixth, where the level of the employer's operations under the plan declines.

This rule that is proposed, and would automatically apply, would cover most of the problems that were covered in your previous testimony. And because we would propose that it be enacted in retroactive form, if it were adopted, it would eliminate and remove much of the court litigation that is now pending.

The second amendment favored by our union trustees would apply to all plans, including the Teamster plans. It would authorize the PBGC to approve reduction or elimination of withdrawal liability on a plan-by-plan basis.

Upon application by the joint board of trustees of a multiemployer plan, which would require approval by both the union and the employer side, the PBGC would be required to approve a proposal for reduction or elimination of withdrawal liability if it found that the proposal would not increase significantly the risk of loss to the PBGC, and that it would be in the long-term interest of participants and beneficiaries under the plan.

In addition, an application filed by the plan sponsor of a financially sound plan would be presumed to satisfy the criteria for approval in most cases.

In other words, we are saying that for a healthy plan, let's return the decision as to what form of withdrawal liability you should have to the plan trustees, who make most of the basic decisions, operating under the requirements of fiduciary responsibility with respect to plan design.

This proposal for plan-by-plan reduction or elimination of withdrawal liability would provide a means of obtaining relief from withdrawal liability in non-Teamster plans. It would also allow Teamster plans to seek even greater reductions in withdrawal liability than would automatically apply under the amendment I described earlier.

Most importantly, it would treat decisions about withdrawal liability like other important decisions of plan design, as I have already indicated.

Under this approach, plans that reduced or eliminated withdrawal liability would continue to pay premiums to the insurance system.

The third and final amendment supported by our employee trustees would change the withdrawal liability rules on sales of assets for employers in all multiemployer plans, not just Teamster plans. In general, asset sales would be treated like stock sales.

Now, there are many other details to these proposals that we would like to have an opportunity to discuss with members and staff and other interested parties.

In sum, the compromise favored by our union trustees would preserve the insurance system and would continue to provide protection to participants of multiemployer plans against plan insolvency.

On the other hand, it would automatically eliminate withdrawal liability in some of the most compelling cases that have been brought to your attention.

Finally, it would permit all plans who meet the standards that would be provided to protect participants to permissively eliminate or reduce withdrawal liability subject to oversight by the PBGC.

Mr. Chairman, whatever approach the Congress ultimately approves, the Western Conference plan urges you not to ignore the severe problems that withdrawal liability has caused. We believe these problems can be solved if all interested parties work together in good faith to solve them.

We appreciate this opportunity to testify on these important issues.

[The prepared statement of Mr. Groom follows:]

PREPARED TESTIMONY OF THEODORE R. GROOM

Mr. Chairman, my name is Ted Groom. I'm a member of the Washington, D.C., law firm of Groom and Nordberg.

I am testifying today on behalf of the Western Conference of Teamsters Pension Trust Fund. With about 600,000 participants working for 16,000 employers in 13 Western States, the Western Conference Plan is the largest multiemployer pension plan in the United States.

Mr. Chairman, we have been involved in the debate over withdrawal liability and the PBGC insurance program since early 1977. At that time, the PBGC reported to Congress that the multiemployer insurance provisions enacted in 1974 were unworkable and could lead to the imposition of an $80 per participant annual insurance premium. This was because of the very large liabilities of multiemployer plans that were likely to terminate and make a claim on the PBGC.

We were alarmed by these projections and concerned that the Western Conference Plan could be required to pay tens of millions of dollars in premiums every year to the PBGC, but get nothing in return because our plan is healthy and solvent.

A principal aspect of PBGC's solutions to these problems was to propose that employers that leave multiemployer plans be required to pay for a portion of the unfunded benefits that they leave behind. The Administration and the Congress concluded that this "withdrawal liability" was necessary in order to discourage employers and local unions from abandoning unhealthy multiemployer plans and leaving the benefits to be paid by the PBGC and, through premiums, by healthy plans like ours.

Throughout this debate, the Western Conference Plan was the most outspoken opponent of the proposed multiemployer insurance system. We urged the Congress to consider much more modest alternatives to the proposed program. However, when these efforts failed, we felt that if the Congress was going to adopt a sweeping benefit guarantee program, the program should include features designed to protect healthy plans such as ours from having to pay the benefits that were promised by other plans. Thus, we supported a limited form of withdrawal liability as a way of preventing the liabilities of other plans from being shifted onto the Western Conference Plan and of protecting employers and participants that remained with the WCT Plan.

Since the Multiemployer Act was signed into law 18 months ago, the focus of concern has shifted from the possible bankruptcy of the PBGC to the adverse, sometimes disastrous, effects that withdrawal liability has had on some employers that have withdrawn from multiemployer plans. The PBGC has been amply protected by the new insurance system, but many employers feel that they have not been.

Mr. Chairman, we did not want this system in the first place, so we are not at all insensitive to the harm that has befallen employers and others as a result of it.

Thus, both the employee Trustees and the employer Trustees of the Western Conference Plan urge the Congress to take appropriate legislative action to address the problems that have developed under the withdrawal liability rules of ERISA. Although our Trustees are not in agreement on exactly what form an amendment to ERISA should take, I would like to outline for you the two legislative approaches that are currently supported by our Trustees.

Our employer Trustees favor the approach taken in S.1748, and share the concerns expressed before this Subcommittee by, among others, witnesses for the American Trucking Association. They feel that the PBGC insurance system for multi-employer plans should, in effect, be eliminated because, on the one hand, it is harmful to the Western Conference Plan and, on the other hand, it is highly unlikely ever to provide any benefit to our Plan. The current program is harmful to our Plan because it requires premium payments from our Plan of hundreds of thousands of dollars a year, and because it imposes unnecessary withdrawal liability on employers. Our employer Trustees have also concluded that withdrawal liability is unfair to current employers and a serious deterrent to new employers entering the Plan. They also feel strongly that many of the problems caused by withdrawal liability will persist if withdrawal liability is merely reduced rather than eliminated altogether.

Specifically, merely reducing liability would not necessarily alleviate the fears that employers have of withdrawal liability and multiemployer plans. Over the long term, employers already in multiemployer plans can minimize the extent of their participation in these plans, and other employers can refuse to join multiemployer plans. Thus, our employer Trustees feel that continuing withdrawal liability in any form could have a devastating effect on multiemployer plans.

In addition, if any form of liability is continued, employers will still face substantial uncertainty as to the amount of their potential liability. This lack of control over the amount of potential withdrawal liability frustrates rational business planning and also encourages employers to avoid multiemployer plans. It could also result in efforts by employer trustees to keep benefit increases to a minimum.

Finally, our employer Trustees feel that the major expense involved in attempting to collect withdrawal liability will continue if the liability is not eliminated.

In spite of these enormous costs, our employer Trustees feel that the current program is highly unlikely to benefit our Plan. The Western Conference Plan is so sound and diversified that it is extremely unlikely that it would ever make a claim on the PBGC. And even if the Western Conference Plan did make a claim on the PBGC, it is highly unlikely that the PBGC would ever have the resources to cover benefits owed by a plan as large as ours.

Our union Trustees also favor broad relief from withdrawal liability, but they do not support the approach taken in S.1748. They tend to assume that Congress will not repeal the benefit guarantee program for multiemployer plans, and thus that there will continue to be a need to protect the insurance system in order to keep premiums at a reasonable level. In addition, our union Trustees fear that the 1980 Act has created so much anxiety about multiemployer plans that employers could abandon these plans in large numbers if Congress did repeal the benefit guarantee program and withdrawal liability.

Thus, our union Trustees favor continuing some form of withdrawal liability under the Western Conference Plan, but only in those cases that involve "selecting against" the Plan or otherwise directly harming the Plan. They believe it would be appropriate to amend ERISA to provide for an automatic and retroactive reduction in withdrawal liability under the Western Conference Plan and most other plans involving the Teamsters Union. In addition, they favor expanding the authority of the PBGC to approve the reduction or elimination of withdrawal liability under any plan. Finally, our union Trustees favor changes in ERISA's asset sale rules to remove impediments to ordinary business transactions.

Mr. Chairman, I would like to outline each of these proposals for you briefly. First, with respect to most multiemployer plans that involve the Teamsters Union, our union Trustees favor an amendment that would bring automatic and retroactive relief from withdrawal liability in most cases. This would be accomplished by applying to all employers in these plans a withdrawal liability exception similar to the one that now applies in the construction industry. Under this approach, an employer would generally be exempt from withdrawal liability in the following cases:

(1) where the employer transfers its operations out of the area covered by the plan;

(2) where the owner of the business dies or retires and the business ceases;

(3) where the business goes bankrupt and ceases;

(4) where the business ceases temporarily;

(5) where the employer sells its assets, except where all of the employer's assets are sold to a buyer that continues the operations non-union in the area; and

(6) where the level of the employer's operations under the plan declines.

The second amendment favored by our union Trustees would authorize the PBGC to approve reduction or elimination of withdrawal liability on a plan-by-plan basis. Upon application by the joint board of trustees of a multiemployer plan, the PBGC would be required to approve a proposal for reduction or elimination of withdrawal liability if it found that the proposal would not increase significantly the risk of loss to the PBGC, and that it would be in the long term interest of participants and beneficiaries under the plan. In addition, an application filed by the plan sponsor of a financially-sound plan would be presumed to satisfy the criteria for approval in most cases.

This proposal for plan-by-plan reduction or elimination of withdrawal liability would provide a means of obtaining relief from withdrawal liability in non-Teamster plans. It would also allow Teamster plans to seek even greater reductions in withdrawal liability than would automatically apply under the amendment I described earlier. Most importantly, it would treat decisions about withdrawal liability like other important decisions of plan design by allowing plan trustees to decide, subject to Government oversight, whether to have withdrawal liability and, if so, what form it should take.

The third and final amendment supported by our employee Trustees would change the withdrawal liability rules on sales of assets for employers in all multiemployer plans, not just Teamster plans. In general, asset sales would be treated like stock sales. Under this approach, no withdrawal would occur solely as a result of a sale of the assets of an employer unless the purchaser of the assets failed to sign an agreement at the time of the sale under which the purchaser would "step into the shoes" of the seller for withdrawal liability purposes. Unlike the current law, no seller's bond or buyer's bond would be required, and the purchaser would not be required to continue the operations at substantially the same level as the seller's operations.

Mr. Chairman, whatever approach the Congress ultimately approves, the Western Conference Plan urges members on both sides of the aisle not to ignore the severe problems that withdrawal liability has caused. We believe that these problems can be solved if all interested parties work together in good faith to solve them.

We appreciate this opportunity to testify on these important issues.

Senator NICKLES. Thank you, Mr. Groom, and Senator Culver. We appreciate your input.

A few questions. Senator Cohen, did you have any questions?

Senator COHEN. I will wait.

Senator NICKLES. In the testimony last week, and I assume that you are fairly familiar with the thrust or the tone of the hearing, we heard from many employers that were very upset, I think somewhat reasonably so.

They had contracts that said, yes, we will pay whether it be with Teamsters, or some other type of a multiemployer plan, in most cases a union plan, where they had a defined contribution, as fixed, as part of their contract.

They would contribute a certain percentage of pay, or so much per hour, or whatever, into a retirement fund. Then with passage of the multiemployer amendments, which were made retroactive in 1980, they got caught with an enormous burden, of which they said, "Wait a minute. We had no claim. We never promised to pay those benefits. We promised to pay the contributions."

The suggestions made in S. 1748, but are also made by you today, would alleviate a lot of that.

Mr. Groom, regarding the alternatives that you have made, do you think they would benefit most of the people who were testifying before this committee? You mentioned a broader form of an exemption similar to the construction industry?

Mr. GROOM. Right. Our union trustees' proposal would basically deal with a lot of these problems where there is a sale of assets, or where somebody goes out of business, or becomes insolvent, and does not involve a direct selection against the plan or bargaining out of the plan.

Now, you did have some testimony yesterday where there were situations where there was—last week I should say—where there was a bargaining out of a plan by the union and the employer.

Under our automatic rule, we would still impose withdrawal liability in that type of case. But most of the testimony that you had involved the situation where an employer went out of business, or sold assets, or became insolvent, or had what you would regard as sort of a normal change in business operations that doesn't have anything to do with the plan.

As applied to Teamster-related plans, our union trustees' proposal would eliminate withdrawal liability in those cases. I think it is also notable that we would try to do it retroactively, so that an awful lot of these problems that are now present, if we were able to follow this proposal, and all the related court litigation that is present, could be cleared up and save hundreds of thousands, millions of dollars to both plans and the employers involved.

Senator COHEN. Mr. Chairman, would you yield for a question?

Senator NICKLES. Certainly.

Senator COHEN. On item No. 6, that I think you just touched upon, you say "With the level of the employer's operations, and the plan declines." Is that just a general proposition, does there have to be a threshold, does it have to be sustained over a period of time?

What would be the criteria for applying No. 6, because that, it seems to me, is the crux of something that affects the trucking industry in particular, where, as Senator Culver has pointed out, Congress, at the time it passed the ERISA program, did not contemplate deregulation? And the two, in combination, have produced a situation in which they have got reduced revenues, either the same or even increased operating expenses, and the liability continues on and on.

Now, as a result of deregulation, we find much more competition in the trucking industry. You have got, as a result, reduced revenues coming in, that they cannot compete against those trucking firms that are nonunion, and many of them are facing bankruptcy.

So, the question I would have is, under No. 6, is there any kind of a threshold, or is it a general proposition that where they have reduced operations and can point, for example, to deregulation as a reason for that reduced operation, would that provide an exemption from withdrawal liability?

Mr. GROOM. Generally, it would. What we were specifically referring to is that under current law, Senator Cohen, there is a rule that if you have a decline in the contribution base to the plan below a certain level—generally, it's a 70-percent decline—and that persists for a period of time, that will trigger withdrawal liability even though the employer is still continuing in operation and is contributing to the plan, and is honoring his commitments under the collective bargaining agreement.

In that situation, the employer doesn't really have control over what is happening. He is experiencing bad times. And we have concluded that it is particularly inappropriate in that type of situation to slap the employer, who is having a decline in his fortunes anyhow, with withdrawal liability.

So, we would exempt that type of situation. The type of situation where our union trustees are most interested in preserving withdrawal liability is where there is a deliberate decision made—which happens in many cases—the local union and the employer to say let's get out of this plan and let's go create another plan, because we think we can do better, and let's leave some of the liabilities that we have created on this old plan.

Our union trustees say we still want to provide protection to the plan in those type of cases. So, what our union trustees are describing and what Senator Culver has described really represents an attempt on their part to try and find a little bit better balance to the rules relating withdrawal liability.

In other words, let's protect the plan in the most severe cases where withdrawal liability could hurt the plan, but let's not carry it to an extreme and clobber everybody in every instance.

Senator NICKLES. Thank you, Senator Cohen.

Mr. Groom, have you noticed concrete evidence where withdrawal liability is actually harming the Western Conference plans?

Mr. GROOM. I think maybe after I respond to this, maybe Senator Culver can add, because the Central States plan has really been out in front a little bit earlier in terms of sending out their bills and getting grief from people.

The Western Conference plan has just recently sent out our bills. Our bills are quite a bit smaller than the Central States plan, under $4 or $5 million.

Senator NICKLES. In total?

Mr. GROOM. In total, as I recall, and fairly small on the average.

Senator NICKLES. Senator Culver, was it 150 for the Central States?

Senator CULVER. We estimate, Mr. Chairman, about 130 million.

Senator NICKLES. 130 million?

Senator CULVER. Plus; 130,549,000.

Mr. GROOM. But I think the problem is that the effect on our plan today in the concrete sense has really been in the expense, as Senator Culver referred to, of gearing up, but probably, more importantly, in the attitudes. Probably the more important effects are not just what has concretely happened so far, but in the attitudes that have been adopted by people.

It's clear to us—we thought, frankly, when this act was adopted that withdrawal liability would be a blow to people, but that it would be a temporary thing, and like many changes in law, people would adjust to it.

What we have become convinced of now, I think both on the union and the employer side in our plan, is that it is going to be a long-range problem, and that while withdrawal liability has the immediate effect of keeping employers from withdrawing from plans, that over a long period of time, employers are going to structure their affairs to minimize their participation in the plans. And to the extent that they do this, this hurts the participants of the plans.

Senator NICKLES. It hurts the employees.

Mr. GROOM. It hurts the employees. It's detrimental from the union side, too, because the employers begin taking a position that this is going to become a defined contribution plan, we aren't going to have any unfunded benefits of any type; that we are not going to have past service benefits, we are not going to do this and that.

Senator NICKLES. So, the employers, over the course, would be looking for primarily defined contribution plans, get away from the liabilities that are involved under the Teamster's plans today?

Mr. GROOM. Right.

Senator NICKLES. Senator Culver, would you care to answer that also. Probably every Senator and Congressman has had people contacting them. Employers are saying, wait a minute, what did you guys do to us, we received a notice from the Teamsters or from somebody else that we have an enormous liability that we were not contracted for?

How do you think that would affect the employees that you are representing?

Senator CULVER. Well, of course, Mr. Chairman, we are experiencing serious problems as a result of the attempts to implement this withdrawal liability program. The numbers, I think speak for themselves, and as Mr. Groom has testified, we are experiencing a number of different tactics being adopted on the employer side to avoid this kind of contingent liability.

Senator NICKLES. Do you think there will be any new employers coming in?

Senator CULVER. Mr. Chairman, I think what is crucial here is the need to make the necessary adjustments in the current program, so that we are going after new blood successfully, rather than dead bodies, in this program.

The important thing here, it seems to me, is that the kind of suggested modifications to existing law, that we are advocating, provide and maintain an insurance system for those plans that need it and feel the need for it.

We also, I believe, will eliminate the inequitable withdrawal liability situations that have been attested to during the previous hearings that you had last week, and, therefore, employers will join and will participate and we will get the new contributions. It will aid in the collective bargaining efforts rather than discourage them.

We will also see an employer willingness to agree to improvements in benefit levels which, as Mr. Groom also referred to, I think looking down the road, will be increasingly a serious problem that the plans will have to face if we don't make some changes.

So, I think in all these areas—and if I might at the same time, Mr. Chairman, just say a word with regard to how the changes that we have advocated will respond to the particular problems that were raised last week.

I have reviewed that testimony, and I think in every single instance except the one involving decertification, the changes that we recommend in the trucking exemption rule, the general changes in the withdrawal liability rule, as well as the sale of asset provision adjustments that we have articulated, will address all those problems, and would correct them all: the eminent domain situation, the merger situation, the decline in operation situation, and in the Johnson Motor Freight case, which has been so celebrated.

Mr. Chairman, I think Mr. Cohen has put his finger on what is a central concern. And that is, Congress, in its wisdom, did order deregulation of this critically important industry.

As you well know, that deregulation effort was resisted by the industry. But now that it's the law, the industry is working very conscientiously to accommodate itself in the marketplace to the new realities of the competitive environment they are in.

It seems to me that it is imperative that Congress be consistent. If, on the one hand, they order deregulation, then on the other hand, they can't place impediments and obstacles for the successful adjustment in the free enterprise market through mergers and acquisitions, and consolidations in the efficient interests of a healthy, strong economy. Withdrawal liability stands as one of the most serious impediments to that kind of adjustment.

Senator NICKLES. Basically, you said the changes you are proposing would take care of, through an exemption primarily, almost everybody that testified with the exception of the one employer that had decertification.

In looking at your statement, and also Mr. Groom's, the exception would be allowed if the business ceased, went bankrupt, the owners of the business died, transferred their operations out, or the employer sells its assets or sells his business except where all the assets are sold to a buyer that continues operations in a nonunion area.

You are saying we want an exemption if he goes ahead and sells it to another union trucking company, but if he sells it to a nonunion trucking company, we want to be able to sock it to him with a large withdrawal liability?

Mr. GROOM. Yes, that's right. Now, I might say that's our automatic rule.

Senator NICKLES. Is this a self-serving, perpetual Teamster lock-in situation where there can be no leaving the Teamster domain? I am a little concerned about how special interest this approach might be.

Mr. GROOM. We are essentially advocating there the rule that is the same in the current law for the construction industry. Now, I might say that under the second rule that we advocate, the change could go much further than that.

Senator NICKLES. You are talking about on a plan-by-plan basis?

Mr. GROOM. On a plan-by-plan basis.

Senator NICKLES. I am going to ask you a question on that one, but I want to make sure I understand the intent of what your proposal is. It gives the flexibility. Under your proposal, you could have almost any transfer of plan selling, closing, whatever, if it is done within the Teamster organization. But if it was done outside, the nonunion type plan, then you think the withdrawal liability should be imposed?

Mr. GROOM. Yes, that's right. There are some other limitations that we haven't mentioned that we would impose, that are not present in the current construction industry rule. For example—I believe Senator Culver referred to this—we would have some basic rules that this only applied to healthy Teamster plans, the automatic rule, and it's a very slender test of health, a ratio of assets to annual benefits payments of 5 to 1, and a requirement that the plan not be in insolvency.

We are suggesting that to protect the plan and the system, but with limitations such as that, generally, all of those rules would apply.

Senator NICKLES. If you had a healthy plan and you are going to transfer assets, let us say, from a Teamster plan to a nonunion plan would you still assume that a withdrawal liability should be imposed?

Mr. GROOM. Yes, unless you followed the second procedure. Now, I might mention that I recognize that I think particularly the decertification situation is a sensitive one. Here, I must say I am not speaking for anybody, but just throwing out an idea, as such.

That is, one of the things that I thought should probably be explored a little bit more in the decertification area would be to see whether it might be possible to limit withdrawal liability to liability that is attributable to that employer's actual employees.

Now, I have talked with a lot of employers who complain about withdrawal liability—in fact, we represent some—but almost all of them say to us when we are complaining about this withdrawal liability, we are not talking about the portion of it that is attributable to our own employees. If some part of that withdrawal liability is attibutable to benefits that have been paid for our own employees, we recognize that we have a responsibility for that possibly even though it wasn't included in the collective bargaining agreement. What really bothers us is that we are picking up withdrawal liability that is attributable to somebody else.

So, it seemed to me that possibly in the decertification area, there might be the potential of providing a further limit there, so that the employer who goes nonunion, and that type—or changes union representative might pick up a portion of withdrawal——

Senator **Nickles**. If you are a member of the Teamster's Union, do you have to participate in the retirement plan? In other words, let us say you were happy working with the Teamster's as far as employment contracts, all benefits except for the retirement, and you wanted to go with some type of an individual retirement, defined contribution plan.

You just happen to poll your employees, you are a small employer in Fairfax, Okla., and you have 14 employees, and they would be very happy if you said yes. We are going to put in an account for you, your $2,000 IRA, or whatever it would be, and the employee said yes, I would like to do that, can they do that and still remain members of the Teamsters?

Mr. **Groom**. No, not under our proposal, not without triggering withdrawal liability. That's the bargaining out situation where the employer and the union agree that they would do better under some other form of plan.

The problem here, Senator, is that you have to recognize that this law deals with a situation in which it is not a question of whether there is absolute justice on anybody's side, because everybody is getting hurt to some extent or another.

The problem is that many of these plans have very substantial unfunded liability, and the employers to whom that is attibutable have long since departed. So, the question is, who picks it up and pays for that benefit, and somebody has to pay for the liability.

So, you have to draw some lines, we believe, or the union trustees believe—our employer trustees do not believe this—our union trustees believe that you have to draw a line to distinguish between some situations in order to protect the plan.

Senator **Nickles**. I appreciate that. Have either of your plans applied for relief from PBGC pursuant to section 4203(f) of the 1980 act?

Senator **Culver**. Mr. Chairman, we have very carefully explored the option for administrative relief under that exemption that the statute offers, and we have not made formal application for it.

Senator **Nickles**. Why not?

Senator **Culver**. Well, the reason we have not, because through informal discussions with the PBGC, we are persuaded that this would not grant us the kind of plan relief that we feel is necessary.

The PBGC, of course, Mr. Chairman, will have to speak for themselves, but they have expressed to us informally their doubts as to whether they could approve relief on a planwide basis. They feel they must provide relief only on a case-by-case situation for certain types of industry as distinguished from a total plan.

And, of course, our plan, as in the case of the Western Conference plan, incorporates a great variety of different industries in addition to trucking, and they feel they could only provide that kind of patchquilt relief.

In addition, PBGC, of course, could not grant total withdrawal liability which we could obtain if both the employer and Union trustees were to make an application under the second broader withdrawal transition proposal that we have advocated in Mr. Groom's and my testimony.

Senator NICKLES. For a total exemption?

Senator CULVER. For a total exemption. PBGC could not do that. If the trustees were to currently determine that in the best interests of their own plan's health, that this would be desirable, PBGC could not grant it.

In addition, Mr. Chairman, there would be major delays in obtaining administrative relief. As you perhaps are aware, PBGC, even though the law went into effect 18 months ago, has not even promulgated final regulations yet on the procedures for making application for relief, much less the substantive standard involved.

In addition, even if PBGC granted the relief sought, their decision of course could then be subsequently challenged in the courts, and result in additional delays and costs. And, finally, I would say, Mr. Chairman, it is certainly not clear whether the PBGC could grant retroactive relief—and this is crucial—retroactive relief, and thus deal with the problems of the sort that have been described to this subcommittee earlier, and which we feel the particular remedy that we are offering would specifically address.

Senator NICKLES. You think under present law, they could not grant you the type of industrywide exemption similar to the construction industry?

Senator CULVER. Planwide, Mr. Chairman.

Senator NICKLES. Planwide.

Senator CULVER. Yes, sir, as distinguished from industry-by-industry exemption, which would present the trustees with a situation, where you would have participation in the plan, where large industries were exempt from any withdrawal liability, others would be obligated to pay it, it would be viewed as inequitable, and it would create inherent tensions within the plan operations.

Senator NICKLES. We have had many people, particularly the employers, that stated they could receive very little information concerning the status of plans. Possibly they had heard—maybe they had negotiated—that, well, yes, our plan is well-funded and no problem in the past. Yet they were hit with this blind-side, enormous withdrawal liability, which they said we did not negotiate for those benefits.

I would like to request you, to supply this subcommittee financial data on the funds including the total assets, total liabilities, vested liabilities, unfunded liabilities, your annual payout, number of participants, et cetera. If you could expand that to include the major Teamster plans, we would appreciate it; not just Central States and western conference, but others.

[The information referred to follows:]

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William R. Charyk
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March 31, 1982

Honorable Donald L. Nickles
Chairman/Sub-Committee on Labor
U.S. Senate
Washington, D.C.   20510

Dear Mr. Chairman:

I am a partner of Sen. John Culver who presented testimony on behalf of the Central States Southeast and Southwest Areas Pension Fund during the hearings on S. 1748. In response to your earlier request, I have enclosed for the record copies of summary data sheets outlining the salient features of the Central States Southeast and Southwest Areas Pension Fund and six other large Teamster-affiliated retirement plans.

The information regarding the Central States Pension Plan has been extracted from the most recent Form 5500 filing and the most recent actuarial report for the Plan.

For purposes of obtaining information on the other large Teamster plans, I obtained from the Department of Labor a listing of the 500 largest pension plans by asset size based upon the Department's 1978 Annual Report data. I identified the Teamster plans which appeared on this list and requested from the Department copies of the most recent available Form 5500 filings. The enclosed sheets have been prepared on the basis of these Forms.

In each case, I have set forth data regarding the number of active participants, the number of retirees and deferred vested participants, the level of annual employer contributions, the annual amount of benefits paid, the net value of assets and the ratio of net assets to annual benefit payments. In addition, I have set forth information concerning the present value of vested benefits, where available.

Honorable Donald L. Nickles
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March 31, 1982

I hope that the attached is responsive to your request for further information.

Very truly yours,

William R. Charyk

WRC:bjl

Enclosures

cc: John C. Culver (w/encls.)

		Source of Information/Date
		Actuarial Report prepared as of January 1, 1981
1.	Name of Plan:	Central States Southeast and Southwest Areas Pension Plan
2.	Active Participants:	391,280
3.	Total of Retirees Receiving Benefits Plus Beneficiaries Entitled to/Receiving Benefits:	94,322
4.	Separated Participants Entitled to Future Benefits:	19,787
5.	Total of Items 2, 3 and 4:	505,389
6.	Annual Employer Contribution:	$651,926,394
7.	Benefits Paid:	$361,538,026
8.	Actuarial Value of Assets:	$2,938,396,000
9.	Net Assets:	$3,080,704,722
10.	Ratio of Net Assets to Annual Benefit Payments (Approximate):	8.52/1
11.	Present Value of Vested Benefits:	$6,682,503,000
12.	Item 8 less Item 10:	($3,744,107,000)

		Source of Information/Date
		Form 5500 filed with the Department of Labor for Plan Year ending 7/31/77
1.	Name of Plan:	Alaska Teamster Employer Pension Plan Anchorage, Alaska
2.	Active Participants:	13,252
3.	Total of Retirees Receiving Benefits Plus Beneficiaries Entitled to/Receiving Benefits:	443
4.	Separated Participants Entitled to Future Benefits:	36
5.	Total of Items 2, 3 and 4:	13,731
6.	Annual Employer Contribution:	$49,730,871
7.	Benefits Paid:	$3,299,614
8.	Net Assets:	$161,341,155
9.	Ratio of Net Assets to Annual Benefit Payments (Approximate):	49/1
10.	Present Value of Vested Benefits:	$100,725,763
11.	Item 8 less Item 10:	$60,615,392

Source of Information/Date

Form 5500 filed with the
Department of Labor for
Plan Year ending 12/31/78

1.	Name of Plan:	Central Pennsylvania Teamsters Pension Fund Reading, Pennsylvania
2.	Active Participants:	27,196
3.	Total of Retirees Receiving Benefits Plus Beneficiaries Entitled to/Receiving Benefits:	4,739
4.	Separated Participants Entitled to Future Benefits:	1,057
5.	Total of Items 2, 3 and 4:	32,992
6.	Annual Employer Contribution:	$25,032,863
7.	Benefits Paid:	$13,926,739
8.	Net Assets:	$163,944,523
9.	Ratio of Net Assets to Annual Benefit Payments (Approximate):	12/1
10.	Present Value of Vested Benefits:	$274,248,928
11.	Item 8 less Item 10:	($110,304,405)

		Source of Information/Date
		Form 5500 filed with the Department of Labor for Plan Year ending 12/31/76
1.	Name of Plan:	New York State Teamsters Conference Pension & Retirement Fund Utica, New York
2.	Active Participants:	23,000
3.	Total of Retirees Receiving Benefits Plus Beneficiaries Entitled to/Receiving Benefits:	3,323
4.	Separated Participants Entitled to Future Benefits:	79
5.	Total of Items 2, 3 and 4:	26,402
6.	Annual Employer Contribution:	$17,630,746
7.	Benefits Paid:	$8,810,462
8.	Net Assets:	$140,368,591
9.	Ratio of Net Assets to Annual Benefit Payments (Approximate):	16/1
10.	Present Value of Vested Benefits:	Not Available From Data Source
11.	Item 8 less Item 10:	----

Source of Information/Date

Form 5500 filed with the
Department of Labor for
Plan Year ending 1/31/80

1.	Name of Plan:	Local 705 International Brotherhood of Teamsters Pension Trust Fund Chicago, Illinois
2.	Active Participants:	16,227
3.	Total of Retirees Receiving Benefits Plus Beneficiaries Entitled to/Receiving Benefits:	3,846
4.	Separated Participants Entitled to Future Benefits:	454
5.	Total of Items 2, 3 and 4:	20,527
6.	Annual Employer Contribution:	$29,752,300
7.	Benefits Paid:	$17,173,380
8.	Net Assets:	$174,737,736
9.	Ratio of Net Assets to Annual Benefit Payments (Approximate):	10/1
10.	Present Value of Vested Benefits:	$283,130,431
11.	Item 8 less Item 10:	($108,392,695)

Source of Information/Date

Form 5500 filed with the Department of Labor for Plan Year ending 1/31/79

1.	Name of Plan:	International Brotherhood of Teamsters Union Local No. 710 Pension Fund Chicago, Illinois
2.	Active Participants:	15,471
3.	Total of Retirees Receiving Benefits Plus Beneficiaries Entitled to/Receiving Benefits:	3,602
4.	Separated Participants Entitled to Future Benefits:	231
5.	Total of Items 2, 3 and 4:	19,304
6.	Annual Employer Contribution:	$24,444,595
7.	Benefits Paid:	$16,179,397
8.	Net Assets:	$195,298,859
9.	Ratio of Net Assets to Annual Benefit Payments (Approximate):	12/1
10.	Present Value of Vested Benefits:	Not Available From Data Source
11.	Item 8 less Item 10:	----

		Source of Information/Date
		Form 5500 filed with the Department of Labor for Plan Year ending 9/30/79
1.	Name of Plan:	New England Teamsters & Trucking Industry Pension Fund Boston, Massachusetts
2.	Active Participants:	48,282
3.	Total of Retirees Receiving Benefits Plus Beneficiaries Entitled to/Receiving Benefits:	13,957
4.	Separated Participants Entitled to Future Benefits:	3,130
5.	Total of Items 2, 3 and 4:	65,369
6.	Annual Employer Contribution:	$72,035,084
7.	Benefits Paid:	$50,034,059
8.	Net Assets:	$331,166,188
9.	Ratio of Net Assets to Annual Benefit Payments (Approximate):	7/1
10.	Present Value of Vested Benefits:	Not Available From Data Source
11.	Item 8 less Item 10:	----

LAW OFFICES
GROOM AND NORDBERG
CHARTERED
SUITE 450
1775 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20006
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STEPHEN M. SAXON
IRENE PRICE
D. KEVIN DOLAN
GARY M. FORD
DANIEL HOROWITZ *
JAMES D. CLARK

*NOT ADMITTED IN D.C.

March 31, 1982

Senator Donald L. Nickles
Chairman of the Subcommittee
on Labor
Committee on Labor and Human
Resources
United States Senate
6327 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

At the March 17, 1982, hearings before the Subcommittee on Labor on S.1748, you requested that we and counsel to the Central States Teamster Pension Fund supply additional financial data regarding the plans that we represent and other plans affiliated with the International Brotherhood of Teamsters. Counsel to the Central States Plan is submitting data on that plan and others under separate cover, and information regarding the Western Conference Plan is attached to this letter.

The attached information on the Western Conference Plan includes a variety of financial data, as well as specimen letters and forms used by the Plan in collecting withdrawal liability. We hope that this information proves useful.

Please do not hesitate to let us know if we can be of further assistance.

Very truly yours,

Ted Groom

Theodore R. Groom

Attachments

Financial Data Regarding Western Conference of Teamsters Pension Trust Fund (for 1980 plan year, unless otherwise indicated)

1.	Name of Plan	Western Conference of Teamsters Pension Trust Fund
2.	Number of Active Participants	383,453
3.	Number of Retirees and Beneficiaries	93,936
4.	Number of Separated Participants Entitled To Future Benefits	59,526
5.	Total of Items 2, 3 and 4	536,915
6.	Total Annual Employer Contributions	$464,154,485
7.	Total Annual Benefit Payments	$263,603,223
8.	Net Assets	$3,262,442,269
9.	Ratio of Assets to Annual Benefit Payments	13 to 1
10.	Value of Vested Benefits (as of end of 1979)	$4,241,163,000
11.	Actuarial Value of Assets (as of end of 1979)	$2,678,239,000
12.	Unfunded Vested Benefits (as of end of 1979)	$1,562,924,000
13.	Number of Contributing Employers	approximately 16,000

14.	Number of Claims Against Employers for Withdrawal Liability (for complete withdrawals in 1980 only)	49
15.	Total Amount of Withdrawal Liability Claimed To Date	$3,935,750
16.	Average Withdrawal Liability Claim	$80,321
17.	Projected Date On Which Plan Will Be Fully Funded (assuming no changes in contributions or benefits)	December 1989

Western Conference of Teamsters Pension Trust

An Employer-Employee Jointly Administered Pension Plan

Office of the Administrative Manager:
2323 Eastlake Ave. E., Seattle, Wa. 98102
(206) 329-4900

Date

Employer Name
Address
City

RE: Western Conference of Teamsters Pension Trust Fund
Employer Withdrawal Liability Notice and Demand for Payment:
Employer Number(s)

Dear

An employer who withdraws from the Western Conference of Teamsters Pension Plan (the "Plan") after April 28, 1980, is generally liable to the Western Conference of Teamsters Pension Trust Fund (the "Fund") for a share of the Plan's unfunded vested benefits, as determined under the Employer Withdrawal Liability Rules and Procedures adopted by the Trustees of the Fund pursuant to the Multiemployer Pension Plan Amendments Act of 1980. On (date), you withdrew from the Plan (describe withdrawal). This Notice is a formal demand for payment of your withdrawal liability in connection with that withdrawal, in the amount specified below, and according to the schedule of Annual Payments below, both of which have been determined by the plan sponsor.

Unless you elect to prepay the full amount of your withdrawal liability in a lump sum, you are required to amortize that liability by making equal Annual Payments of $ (amount) to the Fund over a period of years. Amortization of your withdrawal liability at the interest rates used in the Fund's actuarial valuation as of December 31, (year immediately preceding year of withdrawal), requires Annual Payments for (number) years. However, if this amortization period exceeds 20 years, you are not liable for payments in excess of the first 20 Annual Payments due.

We enclose a detailed description of how your withdrawal liability and your Annual Payments were calculated. Also, enclosed is a detailed amortization schedule showing the exact duration of your Annual Payment obligation.

Each Annual Payment is payable in 12 equal Monthly Installments of $ (one-twelfth of the Annual Payment). Your first payment is due on or before (the date which is 60 days after the date of this Notice). The amount due is the sum of all monthly installment payments due from January 1, 1981 through (the date which is the 10th of the month and year in the month immediately prior to the due date in the preceding sentence). Subsequent Monthly Installments are due and payable on or before the tenth day of each succeeding calendar month until all of your Annual Payments have been paid.

Where to Mail Your Payments

You must make all withdrawal liability payments by check made payable to the Western Conference of Teamsters Pension Trust Fund and mailed to the following address:

Western Conference of Teamsters
Pension Trust Fund
c/o Seattle First National Bank -
Account No. 98-840-556
P.O. Box 2615
Seattle, Washington 98111

An Employer Withdrawal Liability Payment Due Notice is enclosed. One copy of the notice should be returned with your payment to insure proper credit to your account. You will receive an additional billing notice each month for subsequent payments due.

Lump Sum Prepayment Option

The unpaid balance of your total withdrawal liability, plus accrued interest, if any, may be prepaid in whole or in part at any time without penalty. If you wish to prepay the full amount of your withdrawal liability within 60 days of the date of this Notice, the total amount due is (amount).

Request for Review

No later than 90 days after you receive this Notice, you may request in writing that the Fund review any item relating to the determination of your withdrawal liability or of the schedule of your Annual Payments. During this period you may identify in writing any errors in the determination of your allocable share of the Plan's unfunded vested benefits and may furnish the Fund with additional relevant information, if any. Your request for review must be sent to:

Mr. N.J. Moran, Associate Coordinator
Office of the Administrative Manager
Western Conference of Teamsters Pension Trust Fund
2323 Eastlake Avenue East
Seattle, Washington 98102

If you file a timely request for review with the Fund, the Fund, after a review of any matter raised, will notify you in writing of its decision, the basis for the decision, and the reasons for any change in your withdrawal liability or schedule of Annual Payments.

Arbitration

Your right to dispute any determination made by the Fund concerning your withdrawal liability **will be lost** unless you first file a timely request for review with the Fund as described above and then initiate arbitration within 60 days after the date the Fund notifies you of its decision on the matters raised in your timely request for review, or **if earlier,** within 180 days after the date of your timely request for review to the Fund.

Even if you request a review or if you initiate arbitration in accordance with the procedures outlined above, you are still required to make your periodic withdrawal liability payments as set forth in this initial Notice regardless of the pendency of any request for review or arbitration proceeding. If you fail to make any withdrawal liability payment when due, liquidated damages, interest and attorneys' fees will accrue on the unpaid amount at the rate applicable to delinquent employer contributions (see Trust Agreement, Art. IV, S 3).

The city in which any such arbitration would be held is as indicated on the enclosure herewith, subject to your rights to seek a change under the Plan's withdrawal liability arbitration rules.

Default

Amounts determined to be in default will be referred to legal counsel for collection, in which case you also will be liable for the Fund's reasonable attorneys' fees and costs. In the event of your default, the Fund, at its option, may require immediate payment of the entire outstanding amount of your withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. Events of default are defined in Section 16(c)(5) of the Fund's Employer Withdrawal Liability Rules and Procedures and include (among other events) the failure of the employer to make when due any withdrawal liability payment, if the failure is not cured within 60 days after the employer receives written notification from the Fund of such failure.

Any amount finally determined to have been paid by you in excess of your withdrawal liability to the Fund will be repaid to you, together with appropriate interest.

A copy of the Agreement and Declaration of Trust of the Western Conference of Teamsters Pension Trust Fund, which includes the Fund's Employer Withdrawal Liability Rules and Procedures, is enclosed for your information.

Sincerely,

:jar:9

enclosure

WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND
EMPLOYER WITHDRAWAL LIABILITY DETERMINATIONS
FOR COMPLETE WITHDRAWALS IN 1980

Name(s) of Employer(s) (employers under common control):

____

Withdrawal Date: ______________________________

Employer Pension Account Number(s) - Accounts under common control ("affiliated accounts):

__________ __________ __________ __________ __________

__________ __________ __________ __________ __________

__________ __________ __________ __________ __________

1. Withdrawal Liability Amount for a Complete Withdrawal:

Years (Inclusive)	Employer's Contributory Hours All Affiliated Accounts	Employer's Required Contributions All Affiliated Accounts
1975	__________	$__________
1976	__________	$__________
1977	__________	$__________
1978	__________	$__________
1979	__________	$__________

A. Sum of all contributions required to be made by the employer under the Plan, 1975 through 1979: $__________

B. Sum of all contributions made, 1975 through 1979, by all employers who had an obligation to contribute under the Plan in 1980 and had not withdrawn before April 29, 1980: $__________

C. Factor for Employer's prorata share of unfunded vested benefits ((A) ÷ (B)): __________

D. Total Amount of Plan's Unfunded Vested Benefits as of 12-31-1979: $__________

E. Employer's prorata share of Unfunded Vested Benefits ((1C) X (1D)): $__________

F. Less De Minimis Offset: $__________

G. Employer's Withdrawal Liability amount for a Complete Withdrawal After DeMinimis Offset ((E) - (F)): $__________

H. Adjustment for transfer of liabilities (Rules S 10(b)): ☐ Not Applicable

☐ $__________

I. Adjustment for withdrawal following plan merger (Rules S 10(c)): ☐ Not Applicable

☐ $__________

J. This withdrawal is not a qualifying sale of assets withdrawal (Rules S 4).

K. Employer's withdrawal liability before adjustment under Rules SS 16, 18: $__________

L. Adjustment to reflect limitation of annual payments (Rules S 16): ☐ Not Applicable

☐ $__________

M. Adjustment to reflect any limitation on withdrawal liability under Rules S 18: ☐ Not Applicable

☐ $__________

N. Employer's Withdrawal Liability amount for a complete withdrawal, after all adjustments: $__________

2. Annual Payment Amount for a Complete Withdrawal

A. Employer's average annual number of contributory hours for three highest consecutive years from 1975 through 1979: __________

B. Employer's highest contribution rate required from 1976 through 1980 $__________

C. Employer's Annual Payment Amount ((2A X (2B)): $__________

D. Monthly Installment Payment ((2C) ÷ 12): $__________

3. Is this a Complete Withdrawal?

☐ Yes (Complete Item 4 below)

☐ No (Complete and attach "Adjustment for Partial Withdrawals" worksheet)

4. Payment Schedule

   A. Unless you prepay the full amount of your withdrawal liability in a lump sum, your initial payment of $______________ is due ______________________.

   B. Amortization of your employer withdrawal liability amount in accordance with the January 1, 1980 Actuarial Valuation of the Plan requires you to make monthly payments in the amount shown on Line 2.D. for _________ months with the final payment of $______________ due on ______________________.

   C. An amortization schedule is enclosed.

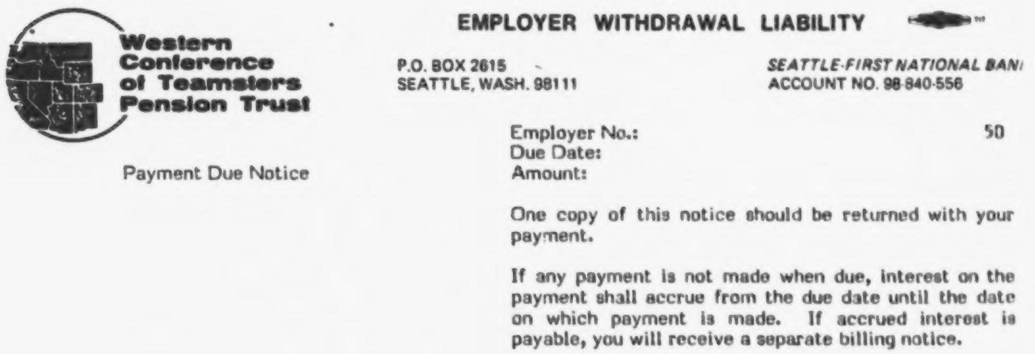
5. The Place of any Arbitration

   A. Names and addresses of the depository banks to which the employer was obligated to remit contributions during some part or all of the calendar year preceding the calendar year of withdrawal: ______________________________

   ____

   ____

   B. City in which any arbitration would be held, subject to the employer's right to seek a change under the withdrawal liability arbitration rules: ________________



Western Conference of Teamsters Pension Trust

Payment Due Notice

EMPLOYER WITHDRAWAL LIABILITY

P.O. BOX 2615
SEATTLE, WASH. 98111

SEATTLE-FIRST NATIONAL BAN
ACCOUNT NO. 98 840-556

Employer No.: 50
Due Date:
Amount:

One copy of this notice should be returned with your payment.

If any payment is not made when due, interest on the payment shall accrue from the due date until the date on which payment is made. If accrued interest is payable, you will receive a separate billing notice.

Senator NICKLES Senator Cohen, did you have any additional questions?

Senator COHEN. Just one question, or perhaps an observation. Senator Culver, you mentioned the kind of delays that are involved in seeking administrative relief, as well as restrictions involved.

As a former and very distinguished member of this Senate and House, you are also aware of the kind of congressional delays that are involved in the passage of any legislation. I was particularly impressed with your metaphor, at least, about the need to go after new blood instead of dead bodies.

I think what comes through, at least from the testimony to date, is that we have to try and give some kind of immediate transfer of blood before we have a lot more dead bodies in the form of the bankruptcies you have been talking about.

So, I would assume that both of you would agree that we have got to do something very, very quickly in Congress.

Mr. GROOM. Yes, we do.

Senator CULVER. We certainly do.

Senator NICKLES. Senator Cohen, thank you. Gentlemen, I think the trend of your statements as being conciliatory, and I ask that you work with our staff and also some of the other side of the issue to see if possibly we cannot get together and work out a compromise. Some of the statements you made today are in that thrust of direction and I am appreciative of that.

Our staff will set up a meeting and see if we can come up with a consensus or a solution to this problem this session. We will try to set it up within the next week or two. If you could assist us in that, we would appreciate it.

Senator CULVER. Thank you very much.

Senator NICKLES. Thank you very much.

Our next panelist is Robert Georgine, who is chairman of the National Coordinating Committee for Multiemployer Plans.

Mr. Georgine, it is good to see you again before our committee. You have been here many times. Welcome.

STATEMENT OF ROBERT A. GEORGINE, CHAIRMAN, NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS, ACCOMPANIED BY GERALD M. FEDER, ESQ., JACK CURRAN, LEGISLATIVE REPRESENTATIVE, WASHINGTON, D.C.

Mr. GEORGINE. Thank you, Mr. Chairman. It is good to be here.

Senator NICKLES. I notice you have a very lengthy statement. Again, I would request that all of our panelists limit their remarks to 5 minutes.

We will enter your remarks in total as if read, and so any other supplemental oral comments would be very much appreciated, by all of our panelists.

Mr. GEORGINE. Well, Mr. Chairman, I will try to be as brief as possible in my formal presentation. As you said, we have a more expanded position in. And then I cut that down for my oral statement, and looked at that, and that was too long, so I have cut it down again.

Senator NICKLES. You and I are going to get along real well.

Mr. GEORGINE. So, if I am a little disjointed through this, you will have to bear with me.

Senator NICKLES. That is fine.

Mr. GEORGINE. Mr. Chairman and members of the subcommittee. As chairman of the National Coordinating Committee for Multiemployer Plans, I would like to thank you for the opportunity to testify with respect to S. 1748, the so-called Multiemployer Pension Plan Stabilization Act.

I guess I should say at the outset that we oppose the enactment of S. 1748. We believe that the bill represents a short-sighted and ill-conceived approach to a question that Congress has struggled to answer during the course of the last decade. Congress has twice rejected the answer embodied in this bill. The question at issue is this: Who is going to bear the risk that the retirement benefits promised to the millions of workers covered by multiemployer plans which might not be paid?

Three answers have been suggested to resolve this fundamental problem. One possible answer was that multiemployer plans be excluded from any Government program to guarantee pension benefits.

Frankly, those of us who had spent much of our adult careers establishing, implementing and participating in multiemployer plans felt that termination insurance was unnecessary for our plans.

According to a U.S. Government study, only a handful of small multiemployer plans had ever been terminated. Almost all of those that could not continue to pay benefits protected their participants by merging into healthier plans. Never had multiemployer plan participants faced the kind of retirement catastrophe that resulted from the Studebaker shutdown.

But, in 1974, when ERISA was passed, the Congress rejected that solution out of hand—universal benefit guarantees were viewed by all of us as a cornerstone to the national pension reform legislation.

There were those in 1974 who believed that the Federal Government should bear the risk of providing benefit guarantees, that the Federal Treasury should cover benefit obligations when plan assets are insufficient. This was the second possible answer to the fundamental question posed earlier. Congress, however, would not accept this solution in 1974, and, I daresay, is not likely to accept it today.

The third possible answer to this question was adopted in ERISA in 1974, and refined, for multiemployer plans, through the amendments enacted in 1980. ERISA established a pension benefit insurance system funded in part by termination liability payments from the employers whose pension obligations would be paid by the system, and in part by the premiums paid out of the assets of all other plans.

The insurance program enacted in 1974 contained a major structural flaw, namely, the manner in which the contingent employer liability provisions applied to the multiemployer plans.

In the single employer context, an employer could not stop contributing to a partially funded plan unless the plan were terminated. In that event, the employer would be liable, generally, to the PBGC for the additional funds needed to cover guaranteed benefits.

Thus, employers sponsoring single employer plans could not avoid their duty to fund plan benefits by ceasing to contribute and terminating plans. In multiemployer plans, on the other hand, any one employer, or even a large number of employers, could generally cease participation without resulting in the immediate termination of the plan.

Since, under the original law, employer liability was triggered in multiemployer plans as well only by the termination of the plan, it was only those who were left in the plan at the time it terminated who would bear the liability.

Thus, the very terms of the law itself created a tremendous incentive for contributing employers to get out of multiemployer plans. This fact created a fear of being the last man out the door, the one left holding the bag.

After 4½ years of experience and based on extensive study and consultation with all possible affected parties, legislation was introduced to remedy the defects in the original termination insurance program, and to nurture the continuing health of multiemployer plans.

The 1980 legislation was, as many members of this subcommittee are aware, the product of extraordinary efforts and painful compromise. None of the affected parties were fully accommodated in the new law. The risk of plan failures was variously distributed among employers, participants, and plans. Employers resisted having to make good on their pension promises via the concept of withdrawal liability; organized labor and plan participants were deeply disturbed by the notion that their pensions would be guaranteed at less than 100 percent of vested benefits, and that those benefits could be reduced even before the PBGC was involved; plan sponsors were unhappy about having to pay increased insurance premiums. Nonetheless, each of us agreed that accepting a part of the total burden was preferable to what would otherwise be unacceptable and disastrous alternatives.

Together, we forged an unprecedented coalition of labor, management, plan representatives, and other committees to the survival of multiemployer pension plans.

Mr. Chairman, the fact is that the Congress misjudged the effects which the 1974 provisions of title IV of ERISA would have upon multiemployer plans.

The fact is that during the first few years after ERISA, a variety of economic factors came together that put the viability of some multiemployer plans in grave jeopardy.

The fact is that the original termination insurance program provided enormous incentives for employers to shift the burden to other plans and to other employers.

The fact is that after extensive study, the executive branch and the Congress determined that the law required major revisions.

The fact is that representatives of every interested segment participated in a painstaking and often difficult process of compromise and balancing of interests in order to reach agreement; that Congress spent almost 2 years considering and finally acting upon a revised program; that the PBGC has now worked for almost 18 months to implement the complicated provisions of the new law, and that the PBGC has performed with diligence and care in trying to administer the new program fairly.

And the fact is that employers, unions, plans and participants themselves are just beginning to adjust to the realities of the new law.

But the authors and supports of S. 1748 would ignore these facts. They would shut their eyes to the lessons of the past. If this bill has been drafted in good faith, I am constrained to say that it is shortsighted at best.

If, however, the bill has been thrust into the legislative arena because some of those previously committed to the 1980 Act did not get exactly what they wanted, then it represents a betrayal—a betrayal of hard-won compromise and a betrayal of a national policy to provide some modicum of economic security to those who have retired and expect to collect the pensions which they have bargained for and which they have earned.

The National Coordinating Committee for Multiemployer Plans is not shortsighted, and it will not renege on the promise made in the 1980 law.

S. 1748 has been introduced with the stated purpose of stabilizing multiemployer plans. If it became law, however, it would in fact do just the opposite.

By redefining virtually all multiemployer plans as fixed contribution plans, the bill would remove them from coverage under the termination insurance provisions of the act. Under the bill, the clock would be partially turned back, for multiemployer plan participants, to the days prior to the enactment of ERISA.

Thus, if a multiemployer plan fails, there would be no benefit guarantees for participants and retirees. After a lifetime of work, these individuals would be denied pension benefits. For many, this could mean the denial of food, clothing, and shelter.

Participants and retirees in multiemployer plans are, under this bill, to be treated as second-class citizens, denied the retirement income security that the law promises individuals covered by single employer plans.

But, why? The answer appears to be that it is no longer convenient for some to keep their part of the bargain made during the legislative development of the 1980 amendments.

The supporters of this bill complain that their obligation to pay withdrawal liability has become unexpectedly burdensome. But is it an unfair burden in light of the obligation put upon plans to meet tougher funding standards and pay increased insurance premiums? Is it an unfair burden in light of the reduced benefit guarantees which participants were forced to accept as part of a balanced compromise?

The fact is that withdrawal liability represents nothing more than an employer's continuing obligation to fund an allocable share of the plan's unfunded vested liabilities. So, why is it more equitable to pass the obligation, as this bill would, back to the employers who remain in the plan?

As to the burdens on employers, Mr. Chairman, I think it is important that you be fully cognizant of the numerous statutory provisions that temper the impact of withdrawal liability to avoid undue hardship for employers. I have attached a paper to my prepared testimony which describes circumstances where, under the existing law, an employer may avoid liability upon withdrawal.

The coordinating committee fully supports efforts by plans and appropriate agencies to interpret the new law in ways which avoid the imposition of withdrawal liability in an inappropriate manner or amount.

Indeed, I call today for the entire multiemployer community—unions, employers, plans, and administrative agencies—to join hands in an effort to administer and interpret the new law sensibly. We believe that tensions related to the 1980 changes can be greatly reduced by implementing the law with a view toward properly balancing the amelioration of employer hardships with the needs of the plans, the needs of their participants and beneficiaries.

Mr. Chairman, the sponsors and supporters of S. 1748 argue that their bill will return multiemployer plans to their pre-ERISA state of well-being. I can only say that such rhetoric belies reality.

It is clear to me that if this legislation should become law, contributing employers will jump ship at the earliest opportunity—if for no other reason than they will no longer be willing to take the chance of waiting to see whether Congress will, 2 years hence, reverse direction once again and impose yet another termination insurance program.

Multiemployer plans would swiftly become white elephants and the benefits promised would quickly vanish as limited plan assets were expended without replenishment. We should not and must not permit the expedient needs of a few to destroy this Nation's longstanding commitments to so many.

Thank you very much.

Senator NICKLES. Mr. Georgine, we appreciate your comments.

[The prepared statement of Mr. Georgine follows:]

National Coordinating Committee for Multiemployer Plans

SUITE 603 • 815 SIXTEENTH STREET, N.W., WASHINGTON, D.C. 20006 • (202) 347-1461

Statement of

Robert A. Georgine, Chairman,

National Coordinating Committee for

Multiemployer Plans

Before the Subcommittee on Labor

of the Senate Committee on

Labor and Human Resources

Mr. Chairman and Members of the Subcommittee:

As Chairman of the National Coordinating Committee for Multiemployer Plans, I would like to thank you for the opportunity to testify with respect to S. 1748, the so-called "Multiemployer Pension Plan Stabilization Act."

Let me first describe the Coordinating Committee itself.

The National Coordinating Committee for Multiemployer Plans is a nonprofit corporation which was organized to represent the interests of the more than eight million workers who participate in collectively-bargained multiple employer plans. The Coordinating Committee's affiliates include more than

140 pension, health, and welfare funds, local Taft-Hartley trusts, and related international unions. Our affiliates together represent the great majority of the participants in multiemployer plans.

As you are aware, these plans provide benefits for workers in such industries as the retail and service trades, the needle trades, the maritime trades and the building and construction trades. Because of frequent job changes in the industries in which these plans exist, a multiemployer plan -- that is, a plan which provides an employee with credit for service with more than one employer -- is often the sole means of assuring that these workers receive a pension.

Mr. Chairman, we oppose enactment of S. 1748. We believe that the bill represents a short-sighted and ill-conceived approach to a question that Congress has struggled to answer during the course of the past decade. Congress has twice rejected the answer embodied in this bill. The question at issue is this: who is going to bear the risk that the retirement benefits promised to the millions of workers covered by multiemployer plans might not be paid?

Three answers have been suggested to resolve this fundamental problem. One possible answer was that multiemployer plans be excluded from any government program to guarantee pension benefits.

Frankly, those of us who had spent much of our adult careers establishing, implementing and participating in multiemployer plans felt that termination insurance was unnecessary for our plans. According to a U.S. Government study, only a handful of small multiemployer plans had ever terminated. Almost all of those that could not continue to pay benefits protected their participants by merging into healthier plans. Never had multiemployer plan participants faced the kind of retirement catastrophe that resulted from the Studebaker shut-down. But, in 1974, when ERISA was passed, the Congress rejected that solution out of hand -- universal benefit guarantees were viewed by all as a cornerstone of the national pension reform legislation.

There were those in 1974 who believed that the federal government should bear the risk of providing benefit guarantees -- that the Federal treasury should cover benefit obligations when plan assets are insufficient. This was the second possible answer to the fundamental question posed earlier. Congress, however, would not accept this solution in 1974, and, I daresay, is not likely to accept it today.

The third possible answer to this question was adopted in ERISA in 1974, and refined, for multiemployer plans, through the amendments enacted in 1980. ERISA established a pension benefit insurance system funded in part by termination liability payments from the employers whose pension obligations would be paid by the system, and in part by premiums paid out of the assets of all the other plans. ERISA also, of course, set minimum standards for plan funding on an ongoing basis, to assure that employer contributions before termination would finance plans responsibly. Prior to 1980, employer liability payments were triggered by the failure of the plan; now employer liability for a multiemployer plan is assessed when an employer withdraws from the plan. The 1980 changes also increased the premiums paid by multiemployer plans, imposed stricter funding rules, and added a co-insurance element whereby plan participants bear part of the risk through lower benefit guarantees and potential benefit cutback.

The Multiemployer Pension Plan Amendments Act (MPPAA) conformed the termination insurance provisions of Title IV of ERISA to the real world of multiemployer plans. Title IV of ERISA was originally written with single employer plans in mind, and, as I will discuss in a moment, had some latent flaws with respect to multiemployer plans.

In fashioning the 1974 plan termination provisions, Congress recognized that multiemployer plans were different. Thus, Congress established a discretionary multiemployer plan termination insurance program with a reduced premium. A mandatory program was deferred and scheduled to become efective 3 and 1/2 years later. The expectation was that during the deferral period enough would be learned about multiemployer plans so that, if necessary, a more appropriate benefit guarantee program could be designed.

As it turned out, Congress' deferral of the mandatory termination insurance program for multiemployer plans was both wise and practical. In its 1977 Annual Report, the PBGC estimated that 12 percent of all multiemployer plans -- covering 20 percent of all plan participants -- were experiencing significant financial hardship. And the forces that had prevented multiemployer plan terminations had been weakened by ERISA itself: stricter vesting and funding rules restricted the bargaining parties' flexibility, while termination insurance took much of the sting out of a decision to give up on a plan by assuring that benefits would be paid in any event. If all of the plans identified as financially troubled were to terminate, the potential cost to the insurance program -- that is, to the remaining multiemployer plans -- was estimated to be more than $3.8 billion. One year later, the PBGC estimated that if all financially troubled plans were to terminate, the termination insurance program would be liable for $4.8 billion. Indeed, in PBGC's 1978 Multiemployer Study the specter was raised that if all financially troubled plans were to terminate, the annual premium rate would soar from 50 cents to $80 per participant!

A major structural flaw in the original program was the manner in which the contingent employer liability provisions applied to multiemployer plans. In the single employer context, an employer could not stop contributing to a partially funded plan unless the plan were terminated. In that event, the employer would be liable, generally, to the PBGC for the additional funds needed to cover guaranteed benefits. Thus, employers sponsoring single employer plans could not avoid their duty to fund plan benefits by ceasing to contribute and terminating the plans. In multiemployer plans, on the other hand, any one employer, or even a large number of employers, could generally cease participation without resulting in the immediate termination of the plan. Since, under the original law employer liability was triggered in multiemployer plans as well only by the termination of the plan, it was only those who were left in the plan at the time it terminated who would bear the liability. Thus, the very terms of the law itself created a tremendous incentive for contributing employers to get out of multiemployer plans. This fact created a fear of being the last man out the door, the one left holding the bag, as highlighted in testimony before the Ways and Means Committee in 1978 by the Executive Director of the PBGC. He testified that employer withdrawals both created and fed upon higher funding costs for the remaining employers, resulting in a "vicious downward spiral" that could culminate in the termination of the plan.

By the middle of 1977 a real crisis was looming for the future viability of multiemployer plans -- a crisis of confidence; a fear of unknown and uncertain liabilities.

This reality caused Congress to enact an emergency law further deferring the effective date of the termination insurance program for multiemployer plans until July 1, 1979. This law also required the PBGC to prepare a report containing analyses and options for multiemployer coverage.

The PBGC Multiemployer Study was presented on July 1, 1978. It contained recommendations for a revised program which would provide "substantial protection to workers at reasonable cost by fostering plan continuation." The Administration presented specific proposals for legislative reform in the spring of 1979.

Thus it was that, after 4 and 1/2 years of experience and based on extensive study and consultation with all possible affected parties, legislation was introduced to remedy the defects in the original termination insurance program, and to nurture the continuing health of multiemployer plans. The 1980 legislation was, as many members of this Subcommittee are aware, the product of extraordinary efforts and painful compromise. Four Congressional committees worked intensively for more than two years. The compromise was developed out of substantial give and take by employers, unions, plan representatives, trade associations, actuarial consultants, and a variety of other interested organizations and institutions, as well as Congress and the Administration. Simply put, the 1980 law was one of the most difficult legislative projects undertaken by the Congress in recent memory.

Mr. Chairman, when I testified before this committee in support of the 1980 amendments, I made no secret of the fact that the Coordinating Committee had arrived at its position with some reluctance and after deep soul-searching. In my testimony before you in 1979 I pointed out that some plan sponsors honestly believed that the proposed legislation would undermine multiemployer plans and the collective bargaining relationships which foster those plans. Nonetheless, we concluded that every effort must be made to develop a workable system -- a system which guaranteed pension benefits to participants who are the victims of dying industries, a system which did not unfairly burden either side of the collective bargaining table and did not provide incentives for labor or management to dump benefit obligations on the insurance system itself. I felt then as I do now that the basic values of our society require a system to protect workers from the financial hardships of pension loss.

It was in this atmosphere that the Coordinating Committee and a wide variety of other interests affected by this legislation worked long and hard to develop the final version of MPPAA.

It should be clear that none of the affected parties were fully accommodated in the new law. The risk of plan failures was variously distributed among employers, participants, and plans. Employers resisted having to make good on their pension promises via the concept of withdrawal liability; organized labor and plan participants were deeply disturbed by the notion that their pensions would be guaranteed at less than 100 percent of vested benefits, and that those benefits could be reduced even before the PBGC was involved; plan sponsors were unhappy about having to pay increased insurance premiums. But, each of us agreed that accepting a part of the total burden was preferable to what would otherwise be unacceptable and disastrous alternatives.

In the face of these realities, we forged an unprecedented coalition of labor, management, plan representatives and others committed to the enactment of the MPPAA. There were temptations to go our separate ways -- to abandon our agreed-upon goal in favor of our individual and more narrow interests. Tenaciously, however, we held together; the coalition stayed intact, and the 1980 amendments became law.

Mr. Chairman, I have not taken the time to summarize the lengthy history of the multiemployer plan termination insurance program merely to demonstrate my "on-the-job" seniority in these matters. The history of this problem and the efforts made to find a solution are critical to your deliberations on S. 1748.

The fact is that the Congress misjudged the effects which the original provisions of Title IV of ERISA would have upon multiemployer plans.

The fact is that during the first few years after ERISA a variety of economic factors came together that put the viability of some multiemployer plans in grave jeopardy.

The fact is that the original termination insurance program provided enormous incentives for employers to shift the burden to other plans and other employers.

The fact is that, after extensive study, the Executive Branch and the Congress determined that the law required major revisions.

The fact is that virtually every interested party participated in a painstaking and often difficult process of compromise and balancing of interests in order to reach agreement.

The fact is that Congress spent almost two years considering and finally acting upon a revised program.

The fact is that the PBGC has now worked for almost 18 months to implement the complicated provisions of the new law -- and the PBGC has performed with diligence and care in trying to administer the new program fairly.

And, the fact is that employers, unions, plans and participants themselves are just beginning to adjust to the realities of the new law.

But the authors and supporters of S. 1748 would ignore these facts. They would shut their eyes to the lessons of the past.

If this bill has been drafted in good faith, I am constrained to say that it is short-sighted at best.

If, however, the bill has been thrust into the legislative arena because some of those previously committed to the 1980 Act did not get exactly what they wanted, then it represents a betrayal -- a betrayal of a hard-won compromise and a betrayal of a national policy to provide some modicum of economic security to those who have retired and expect to collect the pensions which they bargained for and which they have earned.

The National Coordinating Committee for Multiemployer Plans is not short-sighted, and it will not renege on the promises made in the 1980 law.

S. 1748 has been introduced with the stated purpose of "stabilizing" multiemployer plans. If it became law, however, it would in fact do just the opposite.

By redefining virtually all multiemployer plans as "fixed contribution" plans, the bill would remove them from coverage under the termination insurance provisions of the Act. Under the bill the clock would be partially turned back, for multiemployer plan participants, to the days prior to the enactment of ERISA. Thus if a multiemployer plan fails, there would be no benefit guarantees for participants and retirees. After a lifetime of work, these individuals would be denied pension benefits. For many, this could mean the denial of food, clothing, and shelter. Participants and retirees in multiemployer plans are, under this bill, to be treated as second-class citizens, denied the retirement income security that the law promises individuals covered by single employer plans.

But, why? The answer appears to be that it is no longer convenient for some to keep their part of the bargain made during the legislative development of the 1980 amendments.

The supporters of this bill complain that their obligation to pay withdrawal liability has become unexpectedly burdensome. But is it an unfair burden in light of the obligation put upon plans to meet tougher funding standards and pay increased insurance premiums? Is it an unfair burden in light of the reduced benefit guarantees which participants were forced to accept as part of a balanced compromise? The fact is that withdrawal liability represents nothing more than an employer's continuing obligation to fund an allocable share of the plan's unfunded vested liabilities. Why is it more equitable to pass the obligation, as this bill would, back to the employers who remain in the plan? Also ignored by MPPAA critics is the fact that withdrawal liability is payable over a period of time -- and for no more than twenty years even if payments during that period do not fully amortize the liability. Annual payments are made at a rate related to the employer's historic contribution rate. Under the old law, contingent liability was payable in a lump-sum at the time of termination. Also ignored is the fact that an employer does not incur withdrawal liability unless he leaves the plan. Under the old law, plan termination, and the resulting employer liability, was generally outside the control of any one employer.

The problems -- and burdens -- of withdrawal liability are no different today than they were in 1980. The issue is who should bear the risk of plan failures. In 1980, as in 1974 when ERISA was enacted, the Congress was unequivocal in its judgment that the risk must be distributed among all the parties to the bargain.

Tragically, under this bill, the burden of risk is shifted so that it falls solely upon the participants and beneficiaries of multiemployer plans -- and they are the parties who can least afford to bear the burden.

As to the burdens on employers, Mr. Chairman, I think it is important that you be fully cognizant of the numerous statutory provisions that temper the impact of withdrawal liability to avoid undue hardship for employers. I will not recite these provisions as part of my oral presentation. I have, however, attached a paper to my prepared testimony which describes circumstances where, under the existing law, an employer may avoid liability upon withdrawal. The Coordinating Committee fully supports efforts by plans and appropriate agencies to interpret the new law in ways which avoid the imposition of withdrawal liability in an inappropriate manner or amount. Indeed, I call today for the entire multiemployer community -- unions, employers, plans, and administrative agencies -- to join hands in an effort to administer and interpret the new law sensibly. We believe that tensions related to the 1980 changes can be greatly reduced by implementing the law with a view toward properly balancing the amelioration of employer hardships with the needs of plans, their participants and beneficiaries.

Mr. Chairman, the sponsors and supporters of S. 1748 argue that their bill will return multiemployer plans to their pre-ERISA state of well-being. I can only say that such rhetoric belies reality.

It is clear to me that if this legislation should become law, contributing employers will jump ship at the earliest opportunity -- if for no other reason than they will no longer be willing to take the chance of waiting to see whether Congress will, two years hence, reverse direction once again and impose yet another termination insurance program. Multiemployer plans would swiftly become white elephants and the benefits promised would quickly vanish as limited plan assets were expended without replenishment. The supporters of this bill, who seem intent on forgetting the history underlying the 1980 amendments, will be the first to remember that Congress can redo that which it has undone.

I have attempted today to put into perspective the consequences that would result from the enactment of the Multiemployer Pension Plan Stabilization Act. To be sure, this proposal is an expedient one, but it represents expediency at the price of dashing the hopes of individuals who have long depended upon multiemployer plans for their retirement security. These plans have served as a unique means of providing pensions to millions of workers who would otherwise go without benefits. Their role has been to provide whole industries, trades and crafts with coverage which would otherwise not exist at all.

We should not and must not permit the expedient needs of a few to destroy this nation's longstanding commitments to so many.

Appendix A
Withdrawal Liability: Exceptions and Reductions

In deliberating over the legislation which eventually was enacted as the Multiemployer Pension Plan Amendments Act of 1980, Congress found that withdrawals of contributing employers resulted in increased funding obligations for employers who continued to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, as well as labor-management relations.[1] MPPAA was designed to alleviate this situation. Among the declared policies of the legislation were to provide reasonable protection for the interests of participants and beneficiaries of financially distressed plans, and to provide a financially self-sufficient program for benefit guarantees.[2]

In order to create a financially self-sufficient program, Congress increased plan premiums, decreased the level of benefit guarantees, and replaced the contingent employer liability on plan termination with liability for withdrawl from the plan. Withdrawal liability obligates an employer who withdraws from a multiemployer plan to pay its share of unfunded liability under the plan. Without such payments, the liability left behind would fall entirely on those employers who continue participating in the plan. MPPAA recognizes that there is a cost associated with providing benefits to multiemployer plan participants and distributes that cost among contributing employers, withdrawing employers, plan participants and the plans. Withdrawal liability represents an element of the cost distribution accomplished by the Act and, as is demonstrated by the following list, Congress designed this liability with attention to the difficulties it might impose on withdrawing employers.

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[1] Act § 3(a)(4).

[2] Act §§ 3(c)(3), (4).

-- An employer has no liability unless it withdraws from the plan; under the old program, an employer who continued in the plan would have liability for a plan termination -- an event over which it would generally have little or no control.

-- Because withdrawing employers are required to continue funding a share of the plan's unfunded vested liabilities, withdrawals do not impose an increased funding burden on those employers that stay with the plan.

-- Unlike prior law which required lump sum payment of employer liability, MPPAA allows withdrawn employers to pay liability in installments based on their historic levels of plan contributions. Moreover, regardless of the amount of liability or whether it has been fully paid off, an employer is not obligated to make payments for more than twenty years. This "cap" was designed to limit the amount of withdrawal liability that any one employer would have to pay. ERISA § 4219(c).

-- The plan has only the status of a general creditor regarding withdrawal liability; the PBGC claim for termination liability under the old law enjoyed the priority of a tax lien. Moreover, when an employer is insolvent and undergoing liquidation, the plan has general creditor status only as to 50 percent of the withdrawal liability. As to the remainder, the plan comes behind all creditors. ERISA § 4225(b). These changes help preserve the employer's ability to obtain credit.

-- A withdrawing employer generally has no withdrawal liability if the plan has no unfunded vested liabilities.

-- Plans may adopt alternative means for an employer to satisfy its withdrawal liability, if the alternative does not violate ERISA or PBGC rules.

Other mitigating provisions, which recognize the particular circumstances of specific industries and differing equities between specific types of withdrawals, include the following:

-- In the construction and entertainment industries, liability is imposed only where the employer withdraws and continues or resumes performing work in the jurisdiction of the plan or collective bargaining agreement, without making contributions. ERISA §§ 4203(b), (c). These more lenient rules recognize that plans in these industries will not be harmed by events that would otherwise constitute a withdrawal under the general rules.

-- A special withdrawal rule also applies to portions of the trucking industry. ERISA § 4203(d).

-- Plans in other industries are permitted, with the approval of the PBGC, to adopt withdrawal liability rules similar to those that apply to the construction and entertainment industries. ERISA § 4203(f).

-- The owners of an incorporated business may sell the stock of the corporation without incurring withdrawal liability.

-- If an employer sells the assets of his business, there will be no withdrawal if the purchaser continues plan contributions and certain conditions set forth in the statute are met (ERISA § 4204); the PBGC is empowered to waive some of these conditions, and published PBGC interpretations permit plans to waive others.

-- An employer does not incur withdrawal liability merely because it engages in a corporate reorganization, changes its identity, form or place of business, liquidates into a parent company, merges, consolidates or divides, so long as the change causes no interruption in contributions or contribution obligation. ERISA § 4218(a)(1).

- An employer that suspends contributions during a temporary labor dispute does not incur withdrawal liability. ERISA § 4218(a)(2).
- In certain circumstances, plans can be amended to provide that new employers are exempt from withdrawal liability for withdrawals during the first six years of participation. This provision is commonly known as the "free look." ERISA § 4210.

The foregoing provisions result, where they apply, in employers incurring no withdrawal liability for certain events. The law also contains a number of provisions that may reduce withdrawal liability:

- The amount of an employer's withdrawal liability may be reduced or even eliminated by the *de minimis* rule. This rule is intended to reduce the liability burden of small employers and all plans are required to use it. The rule would totally eliminate the withdrawal liability of an employer whose obligation might be as much as $50,000. It would also serve as a reduction for an employer whose obligation is less than $150,000. The Act further provides that a plan may increase the de minimis amount to a certain extent in order to exempt larger employers. ERISA § 4209.

-- The liability of an employer that sells substantially all of its assets is limited to the greater of its "attributable" liabilities or a percentage of its liquidation value; the applicable percentage for liquidation values of $2,000,000 or less is 30 percent. ERISA § 4225(a).

-- Certain personal and real property of a sole proprietor or partner with respect to a withdrawn business is exempt from collection of withdrawal liability. ERISA § 4225(c).

-- An employer who drops out of several plans as part of the same sale, liquidation or dissolution, is only responsible for a proportionate share of liability to each plan. ERISA § 4225(e).

-- Liability of a withdrawing employer is reduced when there is a transfer of liabilities to another plan; the reduction is in an amount equal to the "value . . . of the transferred unfunded vested benefits." ERISA § 4211(e).

-- A reduction applies in the case of a transfer of liability in connection with a withdrawal resulting from a certified change in a bargaining representative. ERISA § 4235.

-- Three specific reductions are prescried in the case of an employer that partially withdraws, and subsequently resumes all or part of its obligation to contribute. ERISA § 4206(a).

-- In order to protect an employer against duplication of liability charges, the Act provides that any computation of liability for a partial or complete withdrawal shall take into account any prior partial withdrawal. ERISA § 4206(b).

-- Where an employer completely withdraws from a plan, and subsequently resumes its obligation to contribute, the liability may be reduced or waived in its entirety. Plans may also provide their own rules for such a reduction or waiver of withdrawal liability. ERISA § 4207.

-- The law contemplates the creation of "withdrawal liability payment funds," commonly referred to as super-trusts. These trusts, to be funded by payments from participating plans, are allowed to pay a portion of an employer's withdrawal liability, thus limiting potential withdrawal liability under the plan. ERISA § 4223.

-- A plan may reduce or eliminate partial withdrawal liability subject to PBGC regulations. ERISA § 4208(e)(3).

The proceeding list shows that the occurrence or the amount of withdrawal liability is affected by numerous factors which are intended to take account of business realities faced by withdrawing employers. They are an attempt to impose the cost of withdrawal liability in an equitable fashion, just as in a larger sense the costs of unfunded plan liabilities have been distributed among employers, participants and the plans.

Senator NICKLES. I heard throughout your testimony the statement of a hard-fought compromise, and I am aware of the fact that you did participate in working in the 1980 act and coming up with a final compromise that did pass Congress; overwhelmingly passed Congress.

In looking at the act, I would say you represented the construction industry primarily in those negotiations, and did very well with the construction exemption that is often alluded to by so many people who said, "Yes, we want to be exempted just like construction industry is," where the construction industry is primarily exempt from the liabilities.

Is that not correct? I guess I am complimenting you for the job you did in exempting primarily your industry from withdrawal liabilities. But now we find many people which are not exempt and wish they were sitting in your shoes, and could be exempt from the withdrawal liabilities that you and others were able to put in primarily for the construction industry, that has not applied to the various other industries.

Mr. GEORGINE. I should point out, Mr. Chairman, that although I do represent primarily the construction industry, that there are many multiemployer plans that are affiliated with the coordinating committee, which I represent. But the exemption that the construction industry was successful in securing in the legislation was one which was discussed by all the parties to that coalition that we created. It is one which everyone was aware of, everyone agreed to, everyone thought was necessary, and it was no big coup by Bob Georgine. It was a thing that was needed.

Senator NICKLES. If it is so good for the construction industry, why would it not be good for the meatpackers, or why would it not be good for the trucking industry?

Mr. GEORGINE. I think it is.

Senator NICKLES. Or why not be good for all multiemployer plans?

Mr. GEORGINE. Well, I think where the facts are basically the same, that it is appropriate for those industries, and I think that the vehicle is there for those industries to get it. I think that is the basic thrust of most of my comments.

What I am really saying to you is that the law, as it is written, provides that PBGC does have the authority to grant that kind of an exemption to industries where it is appropriate.

The problem is that many of the industries that are seeking the exemption haven't requested it.

Senator NICKLES. We heard testimony earlier from Teamster representatives, and they gave two or three reasons. One, they were concerned about the time. They are concerned about the adverse effects. They are concerned about it being industrywide instead of planwide. Let me ask you a question. If the Teamster's Union, if trucking management, if Teamster's plans can all agree upon a solution to withdrawal liabilities in their industry, and if that solution does not pose a threat to the insurance system, should not the Congress approve a change, even over the objections of the coordinating committee, that would allow them an exception similar to that of the construction industry?

Mr. GEORGINE. If all those facts are part of the mix, if the Teamsters agree and PBGC approves, then I don't think you need legislative action.

Senator NICKLES. You do not need to have the——

Mr. GEORGINE. No, I don't think that you need to change the law.

Senator NICKLES. Well, you have an exemption under the law, but they do not have an exemption under the law, and I am trying to catch the difference.

Mr. GEORGINE. What I am trying to say, Mr. Chairman, is that the law provides the PBGC can give them the same exemption. So, if they feel that they need it, if it does not do harm to the total insurance system, and PBGC also feels that they need it, it seems to me that there is no need to have any legislation to get that. The existing legislation provides for that.

Senator NICKLES. They have testified basically that is not the case. The Teamsters today testified that was not the case. They did not feel like the existing law under section 4203(f) was sufficient. We have had existing people from the Trucking Association that said "We want out," and testified to that extent last week.

Here again, I will compliment you for the work that you have done in securing or obtaining the exemption for the construction industry, but it does seem a little bit unusual. We have seen other things in other regulatory fields where people say "We are not regulated, but we want everybody else to be regulated."

I somewhat sense this coming from the group you are representing today. You do not have the withdrwal liabilities. I wonder if I turned it around—if you had all your construction companies that are doing work with building and trade unions, and you started sending out assessments, as required, in an expeditious fashion, where people were saying, yes, if I sell my business, and construction is a very mobile-type business, big contract over here, big contract over here, I can see some reasons for not being under the withdrawal liability.

But, you know, if you were under the law and the same circumstances, and you were not able to obtain the exceptions, and so we had, as Congressmen, received the same objections from industry people all over saying, wait a minute. I signed on with the buildings and trades, and put in a certain percent, never had any idea of what their assets or liabilities were, how they managed the funds or mismanaged the funds, or whatnot. This was my contract. Now, Congress is coming back in and said, whoa. We are going to saddle you with withdrawal liability that is equal to or, in some cases, greater than your net worth. I would think that maybe you would be coming to this Committee with a little different position than you are today.

Mr. GEORGINE. Well, if that were the case—and it's not—but if it were, I may. But let me get off the hypothetical for a moment. You are going to have employers come in here that are assigned to construction industry plans, that are going to make complaints that they are being, you know, unjustly treated and that there is great liability for them.

All I can say is that, you know, those that say that don't really understand the law and the provisions of the law.

Senator NICKLES. So, you still think that there are exceptions that can be allowed under existing law?

Mr. GEORGINE. Mr. Chairman, if I may, the law is—you know, there is only about two or three lines that really are involved in this particular aspect, and if I could just read it. "The corporation"—meaning the PBGC—"The corporation may prescribe regulations under which plans in industries other than—other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this subsection."

Now, the law is clear. The law says yes, we did give it to the construction industry and the entertainment industry because they raised the issues at the time. But if there are other industries that are similar and need the same kind of exceptions, we have the right to do it.

Senator NICKLES. It was mandated under existing law for the construction industry, but it may be under existing law——

Mr. GEORGINE. Because we made the case, Mr. Chairman, that's why.

Senator NICKLES. Again, my compliments. [Laughter.]

Senator COHEN. Could I ask why cannot they make the case now without it being seen as a betrayal?

Mr. GEORGINE. Without it being seen as what?

Senator COHEN. I think you used the word betrayal.

Mr. GEORGINE. Betrayal? No, what I see there—when we entered into this compromise that we did, or this coalition that we had, trying to get these amendments in 1980, we actually signed an agreement. I mean, you know, we actually put down all the provisions, and we signed what we agreed to, and we have that. So, if they are going against what was in that agreement, then that is somewhat of a betrayal, but that is not the issue.

Senator COHEN. The issue is that circumstances change. In the legislative process, I think you recognize that times have changed since 1974, when the bill was originally conceived at least, the multiemployer plan.

Mr. GEORGINE. That's true.

Senator COHEN. I think you had said quite candidly we misjudged the effects of ERISA, that Congress did not take into account the effects that ERISA would have. Now, if circumstances continued to change, why is it not every bit as legitimate for this industry, or some other industry, to come in and say, you know, we like what Georgine was advocating for his industry back in 1980 or 1974 and even in 1980? We find we have got a similar set of circumstances now, that we can no longer survive if this law stays as is.

You suggested that there is enough administrative flexibility to cover these other industries. I think the testimony of Senator Culver and others have been that it would not cover other industries; it would cover individual companies perhaps, but not exempt other entire industries.

Mr. GEORGINE. That is what they have said, and I don't want to get into a debate on who is right or who is wrong, but I tell you what we interpret the law to mean, and I am sure that a careful reading of the law will show that administratively, they can get what they need, the relief that they need.

Senator COHEN. Well, what about the fact—I think what Senator Culver and others have been saying is you have got a catastrophe on your hands in this country when you have a liability—I think Senator Culver said 130,500,000 liability right now—75 million in bankruptcy claims already. And with the current economic situation that we have, we have got a potential for a real catastrophe, which will affect all of the employees that we are concerned about.

Now, the question is one of delay, one of arbitrary interpretation by the administrative process, and most importantly, is retroactivity. Now, why cannot we cure those particular problems legislatively without being accused of engaging in a betrayal of the working men and women of this country?

Mr. GEORGINE. Well, what about the catastrophe if everybody withdraws and there is no liability and there is no money in there to pay the benefits?

Senator COHEN. But you have not suggested—and I agree with that—but you have not come forward, like Senator Culver and others, saying, you know, there may be a half a step that we can take. Maybe this is too extreme. Maybe this goes too far. Maybe it does not take into account what you are talking about, jumping ship.

I am concerned about if this bill or some modification does not become law, it is not a question that the employers are going to jump ship; the ships are going to go under.

Mr. GEORGINE. Yes, the ship is going to go under, and the participants are going to suffer. What I have said—I have not said that I don't have any sympathy for the problem. I do. And I haven't said that we are not willing to go halfway. What I have said is there is another way to go other than legislatively.

Senator COHEN. What is wrong with legislation?

Mr. GEORGINE. What I have said is that the law has only had a very short time to shake down. It hasn't even been on a shakedown cruise yet, and you are talking about the ship sinking.

What we are saying is try the law.

Senator COHEN. I am looking at the bankruptcies. I am looking at the question of everybody going under. I have got a firm in Maine that you may not be familiar with, a company that has been in business for 50 or 60 years, never declared a dividend, always put it back into the business.

And it may go under this year because of actions taken by Congress, and not thinking through the full implications of ERISA, and, secondly, when Congress voted for the deregulation. They can no longer survive under those circumstances.

So, I am faced with a catastrophe in a small situation, but I think it represents what is going on around the other parts of the country.

Mr. GEORGINE. So, what they want to do is get out without liability so that they can compete.

Senator COHEN. No, what they need is some relief, and I think that there has been a proposal. Yours is simply go the administrative route, and I am sure you will find relief. That is the intent.

Well, it may be that we come up with a legislative solution to deal with it that does not go as far as this bill, but meets the legitimate concerns that you have expressed and yet also deals with this problem immediately, retroactively, and rather coherently.

Mr. GEORGINE. Well, if you can do that and it doesn't harm, you know, what exists, and it doesn't harm the protection that the participants have, who could be against it? That's like being against motherhood.

Senator COHEN. That is what I am suggesting.

Mr. GEORGINE. The fact of the matter is that I doubt that that can be done.

Senator COHEN. This is my last question because I have to leave at 12. Why can it be done administratively, but not congressionally?

Mr. GEORGINE. I think you gave the key to that a few minutes ago when you were talking to Senator Culver. You said that—when we were talking about administrative relief and the time that it takes—you, yourself, said that, you know, it takes a long time to get something through Congress. It took 10 years to get ERISA through Congress.

Senator COHEN. I will bet you we can pass something legislative rather quickly this time.

Mr. GEORGINE. Maybe you can.

Senator NICKLES. Thank you, Senator Cohen. Mr. Georgine, do you have any assurances that you can give us that PBGC can and will grant relief to plans which have a great variety of diverse industries contributing to that particular plan?

Mr. GEORGINE. I can't assure you what PBGC will or will not do. I only point out what I think that they are able to do. I don't control PBGC.

Senator NICKLES. I am aware that you don't.

Mr. GEORGINE. I don't even control the building trades. [Laughter.]

Senator NICKLES. I was making that point to illustrate the fact that administratively if you hang your hat, yes, we need some changes administratively. We are going to hear some interesting answers that primarily will refute your statement that we can go administratively. I am of the belief, and I think there is probably a consensus in Congress, that we will have to do something statutorily, legislatively, this year.

Mr. Georgine, I have no further questions. We do appreciate your assistance. I will open the door, hopefully, for you to participate with our staff and other interested parties as we try to work out a solution that will protect the interests of the workers, and also the viability of the industries to continue today.

If you would cooperate with us, we would appreciate that.

Mr. GEORGINE. We welcome that, Mr. Chairman, and I think that we have established a track record of not being negative, but being positive, and trying to reach solutions rather than standing in the way of them.

Senator NICKLES. I am very appreciative of that. Thank you very much.

Mr. GEORGINE. Thank you.

Senator NICKLES. Our next panelists are John Richards representing the National Constructors Association; Robert Wilkinson, Associated Specialty Contractors; and Richard Hall representing the Association of General Contractors of America.

Please confine your remarks to 5 minutes, so we will have a chance to hear all of our panelists today.

Mr. Richards?

STATEMENT OF JOHN RICHARDS, M. W. KELLOGG CO., WASHINGTON, D.C.; ROBERT L. WILKINSON, PRESIDENT, WASHINGTON, D.C., ASSOCIATED SPECIALTY CONTRACTORS, INC., ACCOMPANIED BY DAVID B. WAGNER, JAMES CURRY, JR., AND HOWARD KRAFT; RICHARD E. HALL, PRESIDENT, UNDERGROUND CONSTRUCTION CO., INC., SAN LEANDRO, CALIF., ASSOCIATED GENERAL CONTRACTORS OF AMERICA, ACCOMPANIED BY DANIEL KNISE

Mr. **Richards**. Thank you, Mr. Chairman. My name is Jack Richards. I am vice president of the M. W. Kellogg Co., a subsidiary of Wheelabrator Frye, Brater, Frye, and at the moment, I am chairman of the Government Affairs Committee of the National Constructors Association.

I am here on behalf of the 55 members of the NCA, who are engaged in the design and construction of heavy industrial process facilities. NCA companies do not typically retain a permanent workforce of construction employees, but rather perform construction projects using union-represented labor. As such, our members are party to hundreds of area and national agreements throughout the United States.

The vast majority of these collective bargaining agreements contain provisions which mandate the payment by NCA companies of a specific amount per hour into local and national multiemployer pension plans.

Mr. Chairman, our formal statement has been submitted for the record, so I will not attempt to present it again in its entirety. Instead, I will outline briefly the serious problems our industry faces with the Multiemployer Pension Plan Amendments Act of 1980, or MPPAA, and express our support for this committee and its members in addressing these problems.

In a nutshell, we support the limitation of employer withdrawal liability to contributions negotiated as part of the collective bargaining process. Under MPPAA, however, companies such as ours are finding themselves subject to huge contingent liabilities which they had not contemplated, and which they are, in many instances, unable to pay.

The construction exemption included as a part of MPPAA does avoid serious problems in many areas, but substantial liabilities do remain under pension plans that do not primarily cover construction workers, such as Teamster plans.

I might add that NCA members, as national contractors with little local presence or permanent representation, are particularly vulnerable to the decisions and policies of pension plan boards of trustees upon which they are rarely represented.

I would like to pass on a few specific examples of large potential liabilities being faced by Pullman Power Products, one of our four Wheelabrator Frye, unionized construction companies.

Power Products contributes to various multiemployer pension plans in both the construction and nonconstruction industries. Of particular concern are the plans covering its employees at three piping fabrication facilities: Williamsport, Pa., Houston, Tex., and Paramount, Calif.

These facilities are permanent within the meaning of the law, and do not, therefore, fall under the special rules that waive liability when a construction company leaves an area after completing its work. The unfunded liabilities of these three plans approach $200 million.

Although Power Products shares this amount with other contributing employers, it is greatly concerned about its portion of this potential liability. On one of these projects, Power Products is the major contributor to the pension fund, with 53 percent of total contributions over the past 5 years. Only 1 of the other 28 contributing employers provides more than 1 percent of the total. Justifiably, our company regards its share of such a large potential liability as a serious financial vulnerability.

On one of the other plans, unfunded vested benefits come to nearly 145 million. Even though Pullman's contributions to that fund represent less than 1 percent of the total, nevertheless, its share must also be regarded as a substantial problem.

The National Constructors Association feels strongly that elimination of contingent employer withdrawal liability is in the best interest of all concerned: Companies, workers, and labor unions.

Employer withdrawal provisions under MPPAA subject employers to liabilities far beyond those which were negotiated during the collective bargaining process and actually serve to undermine the very foundations of that process.

NCA members have long recognized that the collective bargaining system provides the best mechanism for safeguarding the legitimate interests of construction workers and insuring that they can look forward to a reliable pension upon retirement.

The provisions of MPPAA, however, actually inhibit new employers from joining multiemployer plans, thereby threatening the long-term survival of the multiemployer pension system which the law was designed to protect.

The only effective remedy is to completely eliminate any federally imposed employer withdrawal liability and rely upon the collective bargaining system to determine fixed contribution levels in a manner acceptable to all parties concerned.

We therefore support and urge adoption of legislation consistent with the provisions of S. 1748.

I thank you, Mr. Chairman, for this opportunity.

[The prepared statement of Mr. Richards follows:]

Statement of the
National Constructors Association

Before The

Labor Subcommittee
Committee on Labor and Human Resources
United States Senate

March 17, 1982

S.1748, THE MULTI-EMPLOYER PENSION PLAN STABILIZATION ACT

Dear Mr. Chairman:

The National Constructors Association, or NCA, is composed of 55 of the nation's foremost engineering, design and construction firms engaged in such diverse facilities as power plants, oil refineries, pipelines, chemical and petrochemical plants, mining and metallurgical facilities, paper mills, and many other industrial processing facilities. NCA members do not typically retain a permanent workforce of construction employees, but rather perform construction projects using union-represented labor. As such, our members are party to hundreds of area and national collective bargaining agreements throughout the United States. The vast majority of these collective bargaining agreements contain provisions which mandate the payment by NCA companies of a specific amount per hour into local and national multi-employer pension plans.

The NCA and its member companies are in full agreement that the Multi-Employer Pension Plan Amendments Act of 1980 (MPPAA) must be amended in a manner consistent with the purpose and intent of S.1748, the Multi-Employer Pension Plan Stabilization Act, and strongly applaud the efforts of this committee and Chairman Hatch to address what is a potentially devastating problem for our industry.

The amendments to the Employee Retirement Income Security Act of 1974 (ERISA) signed into law two years ago have created staggering potential liabilities for our companies. NCA members withdrawing from a multi-employer pension plan find themselves liable for the economic health and solvency of that plan not only far in excess of amounts agreed to during the collective bargaining process, but also far beyond their capability to pay. What results is a situation dangerous for the industry itself as well as for the future of unionized construction in general.

In 1979, the members of NCA were pleased to read that the published purposes of the Pension Benefit Guaranty Corporation (PBGC) were[1]:

1. The program must be compatible with the collective bargaining process;
2. The program should limit the liability of employers to their required contributions rate;

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[1] PGBC Recommendations and Report, February, 1979.

3. The program must prevent avoidable cost transfers to the insurance system (PBGC) while providing protection to employees in dying industries;

4. The program must protect responsible plans from having to assume the cost of plans providing overly generous benefits."

Unfortunately, the Multi-Employer Pension Plan Amendments Act of 1980 in its final version not only did not ". . . .limit the liability of employers to their required contribution rate. . . ." but rather imposed a highly arbitrary and damaging liability, and expanded the amount of the employers' liability to 100% of their assets. The construction industry is feeling the effects of the current economic downturn at least as keenly as any other business sector, and can ill afford the substantial burdens placed on it by this unanticipated and unjustified liability. At stake may be the very survival of unionized companies that might otherwise be able to weather the economic storm.

We support the limitation of employer withdrawal liability to contributions negotiated as part of the collective bargaining process for a multi-employer pension plan, as set forth in S.1748. Under this agreement, the maximum amount of employer liability would be confined to the amount of contributions called for under a pension fund agreement negotiated by an individual employer or a local or national trade association on behalf of its members. An employer who finds himself subject to huge contingent liabilities that he never contemplated, and would never have agreed to, is even prevented under MPPAA from withdrawing from the pension plan. Indeed, it is that very withdrawal which will trigger the imposition of the onerous penalty.

The Multi-Employer Pension Plan Amendments Act changes the rules many years after the negotiations providing for pension plan contributions have been concluded. Had the employer known of these potential liabilities before completing negotiations, it may well have refused to join a multi-employer pension plan or taken steps to ensure that the trust would become fully funded. The Amendments, though well-intentioned, legislatively require a company to pay amounts greatly in excess of those agreed to by the collective bargaining process. In doing so, they jeopardize the relationship between unions and employers and, ultimately, the financial security of the pensioners themselves.

Furthermore, the Multi-Employer Pension Plan Amendments Act as presently structured is not compatible with the collective bargaining process. The Congress, in Section 201(A) of the Labor Management Relations Act, stated:

> "it is the policy of the United States that (a) sound and stable industrial peace and the advancement of the general welfare, health and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the process of conference and collective bargaining between employers and the representatives of their employees."

By the imposition of employer withdrawal liability, however, Congress has passed an ex post facto act that rescinds the goal of the Congress to allow private companies and unions the opportunity to engage in free collective bargaining. Such action, as noted earlier, also violates one of the PBGC's own announced goals. We feel that S.1748 recognizes redress this glaring inequity.

A simple illustration is useful. Saddling a company with a huge withdrawal liability is much the same as telling an employer who negotiated a $1.00 per hour wage increase, basing his price to customers on that amount, that instead he was now liable for a $10.00 or even $100.00 per hour increase. This amount could not now be made part of the price of construction sales retroactively.

In our industry, we have already seen:

1. Companies refusing to purchase or merge with other companies. This occurs because potential buyers are hesitant to assume the contingent withdrawal liability of the company they are contemplating buying. The effect is to force failing companies that might otherwise be sold or merged to declare bankruptcy, thereby depriving employees of their jobs as well as pension benefits;
2. Companies refusing to join multi-employer pension plans. Despite the so called "free look" of six years for new companies, the

potential liability of new companies after the six-year free look period is keeping them out of the plan;

3. Reference to possible employer withdrawal liability on financial statements by accounting firms. This makes it difficult, if not impossible, to borrow money from financial institutions. The long range impact on business, and ultimately on employment opportunities for construction workers, could be very serious.

Congress, in the Multi-Employer Pension Plan Amendment Act of 1980, did provide a limited exemption from employer withdrawal liability for the construction industry. Under this exemption, a construction contractor does not incur withdrawal liability merely by completing a construction project within a given area. Liability is incurred only if the employer continues to perform work on another project in the area without continuing to participate in the plan or returns to the area within 5 years and does not renew participation at that time.

However, major problems remain. The exemption applies only to cases where substantially all of the company's employees work in the construction trade and where the plan itself either covers primarily employees in the construction industry or the plan is amended to include the exemption. It is this latter provision that raises great difficulties for the construction employer. For example, construction contractors often hire workers from the Teamsters union on various aspects of a construction project. Since Teamsters pension plans do not primarily cover construction workers, they must be amended to allow use of the construction exemption where appropriate. In the vast majority of cases, however, such amendments have not been made. As a result, construction employers are subject to the normal withdrawal requirements when employing Teamsters labor, an intolerable situation considering the unique nature of construction which prompted adoption of the exemption in the first place.

Furthermore, there are serious problems with the construction exemption even under pure construction plans. For example, in the case of Woodward Sand Company v. Operating Engineers Pension Trust, withdrawal liability was imposed after an employer's collective bargaining agreement expired and an impasse in further negotiations was reached. The mere inability to reach a new agreement resulted in Woodward being assessed in excess of $264,000 in withdrawal liability, an amount equal to 31% of its net worth, a result which under the circumstances is clearly inequitable.

It should be noted that assessments can be far higher than in the above example. In Shelter Framing Corporation v. Carpenters Trust Fund, the withdrawal liability assessment amounted to twice the employer's net worth. Obviously, it would be impossible to collect this amount, but the law does make it possible for the employer to be held liable for up to 100% of its net worth. This is to be contrasted with prior law, whereby an employer was liable for only 30% of its net worth if a plan termination occurred. The confiscatory nature of the withdrawal liability provision highlights the need for reform in this area.

I might add a word about the somewhat unique vulnerability of NCA members under the Multi-Employer Pension Plan Amendments Act of 1980. As national contractors, NCA companies have little if any say regarding the organization and implementation of pension plans. National contractors are frequently strangers to the geographic area of their projects. Their presence is often transitory and terminates when the project is completed. They rarely are members of the local employer association that negotiates the local collective bargaining agreements, including provisions for contributions to the pension plan and the mechanism for establishing the Board of Trustees which administers the plan. Thus, NCA members have little input into the decisions of the plan trustees regarding the level of unfunded vested liabilities. As a consequence, plan trustees are free to, and in fact do, increase benefit levels without regard to the effect that such increases will have on the withdrawal liability of employers.

In conclusion, the National Constructors Association strongly feels that elimination of contingent employer withdrawal liability is in the best interest of all concerned: companies, workers and labor unions. Employer withdrawal provisions under MPPAA subject employers to liabilities far beyond those which were negotiated during the collective bargaining process and actually serve to undermine the very foundations of that process. NCA members have long recognized that the collective bargaining system provides the best mechanism for safeguarding the legitimate interests of construction workers and ensuring that they can look forward to a reliable pension upon retirement. The provisions of MPPAA, however, actually inhibit new employers from joining multiemployer plans, thereby threatening the long-term survival of the multi-employer pension system it was designed to protect. It can be argued as well that the system of competitive free enterprise itself is undermined since companies are impeded from reorganizing, expanding or retracting operations because of the overriding shadow of withdrawal liability. The only effective remedy is to completely eliminate any federally-imposed employer withdrawal liability and rely upon the collective bargaining system to determine fixed contribution levels in a manner acceptable to all parties concerned. We therefore support and urge odoption of legislation consistent with S.1748.

Thank You.

Senator NICKLES. Thank you very much, Mr. Richards.

Mr. Wilkinson?

Mr. WILKINSON. Mr. Chairman, I am Robert L. Wilkinson. I am appearing today as president of the Associated Specialty Contractors, which is an umbrella organization of eight leading national trade associations of construction specialty contracting employers, representing an industry of about 165,000 business establishments, primarily small businesses with annual sales of about $63 billion and 1,300,000 employees.

The three gentlemen on my left are contractors who will be prepared to answer questions. They are not going to make oral summaries. Mr. James Curry, Jr., chairman of our ASC board, from J. Curry Co., of Lowell, Mass.; David B. Wagner, president of J. F. Wagner's Sons Co., of Louisville, Ky.; and Howard Kraft, president of Climate Controls, of Phoenix, Ariz. These gentlemen have all been longtime contributors, collective bargainers, and trustees of multiemployer plans.

We would like to support the Senate Bill 1748 as the best solution to a very difficult problem that faces the construction industry in spite of the construction industry exception.

Our problem really goes back to ERISA rather than to the MPPAA because of the construction industry exception. More specifically, it goes back to the decision in 1978 of the Federal Appeals Court in the case of *Connolly* v. *PBGC,* when most of us learned for the first time that most multiemployer plans were defined benefit plans instead of defined contribution plans.

Now, the usual practice in our industry is to charge all labor, material, and equipment costs to the specific contract for which these costs are being incurred. In other words, today's customer should pay today's costs, not yesterday's costs on behalf of some different customer, and not somebody else's future costs in the form of reserves for contingent liabilities.

All of a sudden, we are faced, however, with employers contributing to these plans, that were bargained assuming that the obligation of the employer was for so many cents an hour to be contributed, becoming liable for all of the pension benefits, the unfunded vested benefits. This does create the problem of completely destroying our normal accounting practices.

As Mr. Georgine has already said, we did support—most of our associations, probably all of them—did support the coalition in 1980 that drafted the construction industry exception. It was primarily the construction industry exceptions that we were supporting. It certainly makes our condition much, much better than that of other types of employers.

Nevertheless, there are still considerable problems even with the construction industry exception, and these problems would be corrected by Senate bill 1748. We are concerned about possible unconstitutionality due to the fact that the Congress has delegated to private fiduciaries, the boards of trustees, a great deal of discretionary power which, in effect, could destroy a competitor by their decisions as to who has liability and how much.

We are concerned about the withdrawal liabilities on the employers. You have heard enough about that, so I will not dwell on it. We are also concerned about the remaining employers' problems and the trustees' problems of continuing to fund plans according to the exacting standards of ERISA, and this is primarily a problem with the basic concept.

We are concerned about the footnoting by accountants of employers' potential liabilities on financial statements, something that I have not heard any testimony on yet, but a very serious problem because a construction contractor cannot continue to operate if his financial statement indicates so many contingent liabilities that he can't get performance bonds or, in some cases, even bank loans.

We are concerned about the uncertainties of application of the construction industry rules to contractors with off-site fabrication employees because, as of now, the MPPAA itself does not define construction employees adequately enough to know whether these gentlemen, who employ people doing fabricating off-site, can still be covered by the construction industry exception.

The employer who has withdrawn in many cases is not just withdrawing to go nonunion. He may be withdrawing because of retirement, bankruptcy, death, commencement of business at a different location, or as is very frequently the case, he has been in an area temporarily performing a particular contract.

He may have incurred additional liabilities for the trust fund; then he leaves the area. Now, we don't consider that such an employer should have withdrawal liability, and he does not now have withdrawal liability.

The fact is that under the ERISA rules, the remaining employers must then pick up the slack. The trustees must somehow accomplish the virtually impossible job of funding the plan adequately.

We would like to recommend one change, and our written statement explains the change in Senate bill 1748, to specifically state that those plans for which collective bargaining agreements, as is the normal practice in the construction industry, do not specify the benefits, even though those collective bargaining agreements have made the employer subject to the actions of the board of trustees, that plans of that type still be considered as defined contribution plans.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Wilkinson follows:]

Statement of Robert L. Wilkinson on Behalf of
The Associated Specialty Contractors, Inc.
Before the Subcommittee on Labor of the Committee
On Labor and Human Resources of the
U.S. Senate on S. 1748

March 17, 1982

Mr. Chairman, my name is Robert L. Wilkinson, and I am appearing today as President of the Associated Specialty Contractors, Inc. ("ASC"). ASC is an "umbrella" organization of eight national associations*/ of construction specialty employer contractors. The segments of the construction industry represented by ASC affiliates consist of about 165,000 business establishments with annual sales of about $63 billion and 1,300,000 employees.

Appearing with me today are David B. Wagner, President of J.F. Wagner's Sons Company, Inc., of Louisville, Kentucky and Howard Kraft, President of Climate Controls Inc. of Phoenix, Arizona, both of whom have served for many years as management trustees of multiemployer plans.

We are appearing today to express our support for S. 1748, the Multiemployer Pension Plans Stabilization Act of

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*/Mason Contractors Association of America, Mechanical Contractors Association of America, Inc., National Association of Plumbing, Heating and Cooling Contractors, National Electrical Contractors Association, National Insulation Contractors Association, National Roofing Contractors Association, Painting and Decorating Contractors of America, and Sheet Metal and Air Conditioning Contractors National Association, Inc.

1981, which would eliminate withdrawal liability burdens imposed on employers contributing to most multiemployer plans. These liabilities were imposed by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). We would also like to express our appreciation to Senators Hatch and Quayle for introducing S. 1748 and to you, Mr. Chairman, for permitting us to testify today.

I. FROM ERISA TO MPPAA

As you well know, Mr. Chairman, prior to the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"), the sole obligation of unionized construction employers regarding benefits under Taft-Hartley pension trusts was to make contributions on a cents-per-hour-worked basis pursuant to their collective bargaining agreements. The joint board of trustees which ran the trust funds decided what benefits could be supported by employer contributions.

With ERISA's passage, Congress added to the obligations of employers contributing to multiemployer plans by requiring them to pay for unfunded guaranteed benefits if the pension plans terminated. It was not until 1978, however, that a federal circuit court ruled that a multiemployer plan was a defined benefit plan covered by termination insurance. See, Connolly v. PBGC, 581 F.2d 729 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979). The imposition of liability under the ERISA plan termination insurance program was ameliorated by the following factors: a thirty percent of net worth limit on liability for each plan (if an employer were associated with more than one terminated plan, its total liability could exceed thirty percent of net worth); a promised Contingent Employer Liability Insurance ("CELI") program to insure employers against liability; a delayed effective date for mandatory guarantees by the Pension Benefit Guaranty Corporation ("PBGC"); and plan termination, a relatively rare occurrence, being the event triggering liability.

Realizing even in 1974 that the termination insurance scheme did not work for multiemployer plans, Congress delayed the effective date of mandatory insurance coverage and subsequently extended this delay period until a new program for multiemployer plans could be developed. The general consensus was that if the ERISA insurance program became mandatory, it would be economically advantageous for certain plans with large unfunded liabilities to voluntarily terminate and dump their liabilities on the insurance system. The 30 percent of net worth limit on liability would have shielded contributing employers from the greater liability of funding these plans' benefits. If these plans as well as certain others experiencing financial difficulties terminated, the insurance premium required from continuing plans was estimated to be as high as $80 per participant per year. Such a premium would have destabilized healthy multiemployer plans and accelerated their decline.

In addition, ERISA's imposition of liability on employers who had contributed to a plan during the five years preceding the plan's termination encouraged employers to withdraw from a plan at the first sign of plan decline in order to avoid being part of a "last man's club."

With the threat of mandatory insurance coverage going into effect and the continued Congressional commitment to some type of plan termination insurance program, a flawed political compromise called MPPAA was enacted into law. Essentially, MPPAA was an attempt by Congress to deal with the difficulties it had created for itself in 1974 by establishing the plan termination program.

The withdrawal liability imposed by MPPAA on employers in most affected industries was more severe than the ERISA termination liability in that: the thirty percent net worth limit was repealed; the CELI promise was eliminated; the event triggering the imposition of liability was changed from plan termination to the more frequent withdrawal of an employer from a plan; and a mandatory guarantee program was finally established. The severity of the impact of these changes, however, was reduced for construction employers by the special MPPAA construction industry withdrawal rules which made possible construction employer support for MPPAA.

II. UNCONSTITUTIONALITY OF MPPAA

ASC is of the view that MPPAA's scheme for imposing withdrawal liability on employers, whether construction or not, violates the United States Constitution. In the near future ASC will be filing amicus curiae briefs in three of the many pending constitutional challenges to MPPAA.

We agree with the theories advanced by others that MPPAA is unconstitutional on grounds of its retroactive imposition of liability as well as its requirement that withdrawing employers pay a share of unattributable liabilities. One of the theories ASC will be arguing is that MPPAA violates the Fifth Amendment Due Process Clause which prohibits Congress from delegating its legislative prerogatives to private groups.

Prior to the enactment of MPPAA, Congress gave the PBGC the authority to assess termination liability for employers. A dramatic change made by MPPAA was the transfer of this liability-assessing function from a public agency to a private group of fiduciaries. Under MPPAA, Congress delegated to the boards of trustees the interpretation of intrinsically vague statutory terms, the meaning of which is crucial in determining whether a withdrawal has occurred. In addition, Congress gave the trustees broad discretion to determine actuarial assumptions which will be used in calculating an employer's liability (in consultation with the plan actuary) and in deciding whether a withdrawn employer is in default and therefore presently owes the full amount of liability. Giving the trustees authority to select the actuarial interest assumption for the liability calculation enables the trustees to significantly increase or decrease the amount of an employer's liability by relatively modest adjustments in the assumption.

In addition, the delegation of authority to the trustees was to a biased group of decisionmakers. One half of the trustees are union representatives who can be expected to have little sympathy for withdrawing employers who have gone non-union. The other half of the trustees are employer representatives who frequently work for companies that are competitors of the withdrawn employer. It is very likely that these employer trustees will also have little sympathy for the withdrawn employer who will be a non-union competitor with lower costs of doing business. The employer representatives have an added incentive to maximize liability on a withdrawn employer because every dollar that is collected from that employer is one less dollar the company for which the trustee works will potentially be liable for. In addition, many management trustees are former union members who are entitled to pensions under the plan. As such, these individuals will have a personal interest in seeing that as much withdrawal liability is collected from the withdrawn employer as possible.

On top of all these biases, the trustees are ERISA fiduciaries who have an obligation to act solely in the interest of plan participants and beneficiaries and who are personally liable for the failure to do so. It is likely that the trustees will interpret their fiduciary duty to require maximization of withdrawal liability, thereby enhancing the abilities of the plan to pay benefits to participants and beneficiaries.

Although Congress could not have cured the constitutional flaws inherent in the sweeping delegation of authority to private groups of biased decisionmakers by simply providing for de novo review by federal courts, MPPAA provided that in any subsequent arbitral or judicial review of the trustees' determination that a withdrawal has occurred, these determinations by the trustees are presumed correct. This presumption of validity must be given conclusive effect unless the employer can show "by a preponderance of the evidence that the determination was unreasonable or clearly erroneous." If the employer appeals an arbitrator's decision to a federal district judge, the arbitrator's "findings of fact" are shielded from judicial review unless the employer can show "by a clear preponderance of the evidence" that the findings were erroneous. Thus, the legal or factual conclusions of the trustees cannot be overturned by the courts without overcoming layers of burdens and presumptions that bar the courts from openly and evenhandedly examining the issues.

III. PROBLEMS OF CONSTRUCTION EMPLOYERS UNDER MPPAA

Imposition of Withdrawal Liability: When compared with employers in other industries such as trucking, which this Subcommittee heard from on the first day of hearings, employers in the building and construction industry did "relatively well" with respect to the imposition of withdrawal liability.

A construction employer will have a complete withdrawal from a construction plan (or from a non-construction plan which so provides) when it permanently ceases to have a contribution obligation under the plan and continues to perform work in the bargaining agreement's jurisdiction of the type previously contributed for (or resumes such work within five years without renewing the contribution obligation). A partial withdrawal from such a plan will occur if the construction employer's contribution obligation is continued for no more than an insubstantial portion of its construction work in the craft and area jurisdiction of the bargaining agreement.

Even though construction has more "favorable" withdrawal rules than most other industries, withdrawals do occur and at least 13 of the numerous constitutional challenges to MPPAA involve construction employers who allegedly withdrew from plans. As with employers in other industries, a construction employer may engage in a withdrawal through no fault of its own. For example, if there is a jurisdictional dispute between two unions which results in a change in unions and a related change in the pension plan under which contributions are made, a withdrawal will occur. A redrawing of jurisdictional lines between two locals of the same union with different pension plans can also result in employer withdrawal.

Funding: To the extent MPPAA permits construction employers to leave multiemployer plans without liability, those employers continuing to contribute under such plans have a concern about the plan's compliance with its funding obligations and the amounts of its unfunded vested benefits. Any statutory or plan rules which result in the reduction or avoidance of payments of employer contributions or withdrawal liability will impact upon the future contribution obligations of remaining employers.

The construction rule on complete withdrawals permits an employer who ceases construction work in a bargaining contract's jurisdiction to leave behind unfunded benefits attributable to its employees as well as its share of unattributable liabilities. The remaining employers must continue to fund these benefits. The employer who has ceased such work may have done so because of retirement, bankruptcy, death or commencement of business in a different location. The departed employer may have been an out-of-town contractor who made contributions under a local plan for the duration of the project and then left the area without withdrawal liability. Depending upon this employer's contribution level and the nature of the work force used, it may have increased the plan's unfunded liabilities, particularly if it employed workers with vested benefits and a past service benefit increase was subsequently granted. We should add that we nonetheless consider it proper that there not be withdrawal liability in the above situations.

The construction industry partial withdrawal liability rule permits a double-breasted contractor to reduce a plan's contribution base by shifting a large share of its construction work from its union operation to its non-union operation. A partial withdrawal would be triggered only when the contractor's union work becomes an "insubstantial" portion of all of its construction work within the bargaining agreement's jurisdiction.

Even if a construction employer incurs a complete or partial withdrawal, MPPAA contains a number of provisions such as the de minimis rule and the twenty year cap on periodic liability payments, which reduce an employer's share of liabilities. To the extent any of these provisions "forgive" part of the employer's withdrawal liability, the remaining employers must continue to fund related benefit obligations.

Employer Accounting for Withdrawal Liability: The Financial Accounting Standards Board, which develops standards for the accounting profession, has not yet finally decided how MPPAA's withdrawal liabilities are to be reflected on an employer's financial statement. The Board is working on a comprehensive standard on employer accounting for pension benefits which should include accounting for multiemployer plans, but this standard is expected to be completed at some unknown future time.

How an employer's potential liability is reported on its financial statements will obviously impact upon its ability to secure performance bonds, to obtain loans and to sell its business. The uncertainty with respect to reporting withdrawal liability continues as a wild card in construction employers doing business. If potential withdrawal liability must be disclosed, performance bonds may be impossible to get, and many construction employers will face going out of business.

Sale of Construction Business: Despite claims by proponents of MPPAA that the construction industry withdrawal rules would not interfere with the sale of businesses, there remain difficulties with the legislation.

If the owner (which is not part of a commonly controlled group) of the shares of a construction corporation sells its shares to a purchaser, the seller, while not incurring a withdrawal, can expect the purchaser in determining the sales price to take into account the purchaser's assumption of potential withdrawal liabilities. The purchaser of the shares will in effect be assuming the seller's pension exposure because if the purchased corporation later withdraws from a multiemployer plan, the corporation will incur liability and the value of the purchaser's shares will be reduced.

In the case of a double-breasted contractor which sells the shares of its union subsidiary to a purchaser, a multiemployer plan may take the position that the seller has engaged in a withdrawal. The plan can argue that the employer (which under MPPAA and ERISA should be the group of trades or businesses under common control) ceased its obligation to contribute and continued through its non-union company to perform construction in the bargaining agreement's jurisdiction. The double-breasted contractor can respond that under MPPAA and certain legislative history, no withdrawal occurred because there was a mere change in the employer's form or identity, and the union subsidiary continued its contribution obligation. Whether withdrawal liability will be imposed in this situation is not yet clear.

Definition of Building and Construction Industry: A question continues to exist as to whom the special construction withdrawal rules apply. These rules apply to employers that have a contribution obligation for work performed in the "building and construction industry" if (a) substantially all the employees for which the employer contributes perform work in the "building and construction industry," and (b) the plan primarily covers employees in the "building and construction industry" or is amended to apply the construction rule to construction employers. MPPAA does not define "building and construction industry."

The issue is of significance, for example, to the employer who does inside shop fabrication in addition to on-site construction activity. If less than "substantially all" of the employer's employees perform construction work, it is possible that the employer cannot take advantage of the construction industry withdrawal rules.

Efforts are being made by labor and management representatives and the PBGC to develop an acceptable definition of "building and construction industry." But until such efforts are successful, if ever, employers remain at great risk as to whether they are covered by the construction rules.

IV. S. 1748

S. 1748 deals with the foregoing problems of construction employers by eliminating withdrawal liability for employers who contributed to plans under collective bargaining agreements which on April 29, 1980 (or on the date of plan establishment if later) fixed the rate of contributions to the plan and did not fix any pension benefits under the plan. Under the legislation, employers would generally be returned to their pre-ERISA situation of having no liability obligation other than their contractual obligation to make cents-per-hour contributions to multiemployer plans. In so doing, S. 1748 corrects a problem which Congress created for itself in 1974 and which it tried to solve in an unconstitutional manner in 1980.

One technical change we would suggest in S. 1748 is to clarify that typical collective bargaining agreements which incorporate by reference the terms of the declaration of trust and which bind the employer by the actions of the trustees, be interpreted as collective bargaining agreements which do "not fix any pension benefits under the plan." We believe that the intent of the draftsmen was to remove the withdrawal liability burdens for employers who did not directly bargain with the union on the amount of pension benefits.

Mr. Chairman, thank you for your attention. We will be happy to answer any questions.

Senator NICKLES. Thank you, Mr. Wilkinson.

Mr. Hall?

Mr. HALL. Mr. Chairman, members of the subcommittee: My name is Richard Hall. I am a general contractor from San Leandro, Calif. I have been an employer trustee for 12 years. I am appearing before you today on behalf of the Associated General Contractors of America [AGC] where I serve as a member of AGC's ERISA task force.

Accompanying me today is Dan Knise, of the AGC staff.

In the interest of time, I will limit my comments to the key points contained in the written statement, which I request be included in the record.

The Associated General Contractors of America represents over 30,000 construction firms including 8,500 of America's leading general contracting companies.

Together, these firms employ more than 3.5 million individuals. They contribute on behalf of these employees to hundreds of multiemployer pension plans established in collective bargaining agreements.

Today, this subcommittee is addressing the most critical pension issue facing this Congress. Multiemployer pension plans, contributing employers, and employees covered by multiemployer plans are in serious jeopardy.

The Multiemployer Pension Plan Amendments Act of 1980 has in a very short time proven to be inequitable, unworkable, and against the best interests of the very parties that it is supposed to protect: the plan participants.

AGC urges Congress to reconsider this burdensome law. Your colleague, Senator Orrin Hatch, has introduced a bill, the Multiemployer Pension Plan Stabilization Act of 1981, which will correct the problems being created by the 1980 multiemployer amendments.

A companion bill, H.R. 5223, is also being introduced in the House. AGC supports these efforts and the relief embodied in S. 1748 and H.R. 5223.

Multiemployer pension plans have been a most efficient vehicle for providing retirement income for workers in construction, trucking, apparel manufacturing, and other industries. Significant advantages are provided for both covered workers and contributing employers.

Workers enjoy the advantages of portability and a broad funding base, and contractors are able to provide pension benefits to their workers despite high geographic mobility and high employee turnover.

However, the Multiemployer Amendments of 1980 are creating serious problems for multiemployer pension plans. One of the most serious problems is that potential withdrawal liability is preventing multiemployer plans from attracting new contributing employers.

The very nature of multiemployer plans assumes a steady influx of new employers to replace the employers who cease to contribute to the plan due to businesses being sold, owner retirement, or bankruptcy. In addition, the employers are being assessed withdrawal liabilities in excess of their firm's net worth. Naturally, contributing employers and those entering the industry for the first time view multiemployer plans in a very negative light.

It is important not to underestimate the potential impact of employer liability on the construction industry. AGC is currently conducting an inventory of the construction industry pension plans, which disclosed that 84 of the 154 plans which provided information have an unfunded vested liability amounting to $3.6 billion. This does not even include the $5.2 billion of unfunded vested liability maintained by the two large Teamster plans, the Western Conference and the Central States.

As a result of the disincentive associated with potential or actual withdrawal liability, multiemployer plans will suffer an ever-decreasing contribution base, eventually resulting in plan insolvency.

The 1980 Multiemployer Amendments are also creating unnecessary conflict between contractors and unions over the issue of unfunded vested liability. The historical cooperative attitude which has prevailed at plan trustees meetings has been replaced by confrontation and animosity. In addition, the 1980 amendments have increased plan administrative expenses. One plan in Louisiana reported a 66-percent increase in administrative costs as a result of enactment of the 1980 amendments.

This, too, works against the long-term interests of plan participants and beneficiaries. The 1980 Multiemployer Amendments were supposedly designed to secure the future of the typical fixed-contribution/defined-benefit multiemployer pension plan. Despite the stated purpose, employers and unions in various parts of the country have already agreed to a gradual phaseout of their existing plan or to convert their current pension plan to a defined contribution plan.

The Southern California Cement Masons plan, the Western Washington Carpenters plan, and many others are working to fully fund their plans and convert to defined contribution plans.

Because of the potential liability created by the 1980 amendments, AGC has encouraged contractors and unions to consider this option. The critical question is "If Congress truly considered the typical multiemployer plan to be worth saving, how can a law which is forcing management and labor alike to abandon such plans be considered as working properly?"

Rather than preserving today's multiemployer pension plans, the 1980 amendments are encouraging their ultimate disappearance.

S. 1748 would remove the typical construction industry multiemployer pension plan from the burdensome withdrawal liability provisions of title IV of ERISA. If S. 1748 is enacted, plan trustees will be required to act reasonably and the delicate balance of the labor-management partnership will again be restored.

Multiemployer pension plans will again become a desirable alternative to providing retirement income.

In closing, we would like to encourage this subcommittee and the full Senate to give immediate favorable consideration to S. 1748. Thus, by removing the current inequities and disincentives of the 1980 amendments, workers will truly receive the retirement income protection they deserve.

Thank you.

[The prepared statement of Mr. Hall follows:]

TESTIMONY OF

RICHARD E. HALL

FOR

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

BEFORE

SENATE LABOR SUBCOMMITTEE

March 17, 1982

on

THE MULTIEMPLOYER PENSION PLAN STABILIZATION ACT OF 1981

AGC and its 113 chapters represent:

- 30,000 construction firms;
- 8,500 of America's leading general contractors;
- 3,500,000 plus employees;
- A $200 billion market
- More than 80% of America's contract construction of commercial buildings, highways, industrial and municipal utility facilities;
- Over 50% of the construction performed abroad by American firms.

My name is Richard E. Hall and I am President of Underground Construction Company of San Leandro, California. I am appearing today on behalf of the Associated General Contractors of America (AGC) where I serve as a member of AGC's Collective Bargaining Committee and on the ERISA Task Force of that committee.

The Associated General Contractors of America and its 113 chapters nationwide represent over 30,000 construction firms including 8,500 of America's leading general contracting companies. Together, these firms employ more than 3.5 million individuals. They contribute on behalf of these employees to hundreds of multiemployer pension plans established in collective bargaining agreements.

Today, this subcommittee is addressing the most critical pension issue facing this Congress. Multiemployer pension plans, contributing employers, and employees covered by multiemployer plans are in serious jeopardy. The Multiemployer Pension Plan Amendments Act of 1980 has in a very short time proven to be inequitable, unworkable, and against the best interests of the very parties it is supposed to protect -- the plan participants and beneficiaries.

The Associated General Contractors of America urges Congress to reconsider this burdensome law. Your colleague, Senator Orrin Hatch, has introduced a bill - the Multiemployer

Pension Plan Stabilization Act of 1981 (S.1748) -- which will correct the problems that have been and continue to be created by the 1980 multiemployer amendments. This effort is currently co-sponsored by eight other Senators, including Senator Dan Quayle of this subcommittee. A companion bill, (H.R. 5223) has also been introduced in the House. AGC supports these efforts and the relief embodied in S.1748 and H.R. 5223.

Background

In order to fully understand the problems created by the 1980 multiemployer amendments, it is essential to understand the history of multiemployer pension plans. Multiemployer plans have been in existence for more than 50 years. The early plans were established and administered solely by the unions. Over the years the number of multiemployer plans has grown to more than 2,000. Growth provided opportunities for abuse which, in turn, increased concern over improper administration. Thus, in 1947, Congress enacted as part of the Taft-Hartley Act a requirement that there be an equal number of management and labor trustees for each multiemployer pension plan. This action, for the first time, required employers to participate in decisions on benefit levels, fund investment, and plan administration.

For many years the monies necessary to establish and maintain multiemployer pension plans have been provided by employer contributions, based on a cents per hour worked formula. The historical understanding of the unions and employers who established multiemployer plans, and the employees covered by them, has been that the employer's only obligation to the plan is the agreed upon per-hour contribution.

In 1974 Congress enacted the Employee Retirement Income Security Act (ERISA) to remedy a broad range of perceived problems with our retirement income system. ERISA included provisions relating to participation, vesting, funding, reporting, and disclosure. ERISA also included in Title IV a plan termination insurance program to "guarantee" the benefits of pension plan participants.

At the time ERISA was enacted in 1974, and until 1978, contributors to multiemployer pension plans were not particularly concerned with the onerous plan termination provisions of ERISA, because those provisions applied only to "defined benefit" plans, (i.e., pension plans which promised a certain benefit level). Multiemployer plan trustees, contributing employers, local union leaders, and covered employees understood their plans to be "defined contribution" plans based on the fact the the contributing employer's sole contractual responsibility was to make the agreed-to per-hour contribution. In 1978, the Connolly decision (9th Cir. No. 76-2777, May 4, 1978) changed this assumption by holding that multiemployer plans were "defined benefit" plans subject to the plan termination provisions of ERISA. These provisions assessed liability (up to 30% of net worth) for unfunded vested benefits on employers contributing to a multiemployer pension plan at the time the plan terminated, and assessed employer liability on employers who withdrew five years or less prior to plan termination. The fear of this potential liability caused an exodus of employers from many multiemployer plans resulting in a phenomenon commonly referred to as the "last man out club." Employer withdrawals threatened the financial stability of multiemployer pension plans and resulted in increasing the potential liability for remaining employers.

As a result of the problems created by ERISA, Congress enacted the Multiemployer Pension Plan Amendments Act of 1980. The 1980 amendments modified the plan termination provisions of ERISA by broadening the concept of withdrawal liability and shifting the responsibility for guaranteeing the funding of vested benefits from the Pension Benefit Guaranty Corporation (PBGC) to the contributing employers.

The Advantages of Multiemployer Pension Plans

Multiemployer pension plans, as we know them today, have been a most efficient vehicle for providing retirement income for employees in industries such as construction, trucking, apparel manufacturing, food processing, newspaper publishing, warehousing, etc. A significant advantage to covered construction employees is that more than one employer contributes to the funding level of the plan, thereby assuring employees that benefits will be sufficiently funded. If one contractor goes out of business or leaves an area, retirees will continue to receive benefits funded by the contributions of other contractors. Covered workers also have the advantage of being able to move from employer to employer without losing accrued pension benefits. This portability is extremely important to employees in the construction industry, given the high geographic mobility of construction contractors and the construction work force.

Contractors also benefit from multiemployer pension plans. Multiemployer pension plans provide pension coverage for employees despite a high degree of employee turnover. This, in turn, ensures that the contractor will have available an experienced, highly-skilled work force. Contractors, and covered workers, also benefit from the savings in administrative costs and enhanced investment potential resulting from the pooling of contractors' contributions.

Another important advantage, and one that is most significant in light of the impact of the 1980 multiemployer amendments to ERISA, is that the traditional functioning of multiemployer pension plans has presumably provided contractors with a specified "pension cost." The thousands of companies involved in construction obtain work by submitting bids, based on estimates, to compete for a contract to build a particular project. Typically, the project is awarded to the lowest responsible bidder. This bidding process requires contractors to estimate labor and material costs. The margin for error is slim, with four of five contractors entering business today failing to survive five years from now.

Historically there has been one aspect of stability amid the uncertainty which characterizes the bidding process. Contractors know, through collective bargaining agreements, their per-hour costs for wages, pensions and other benefits. From a contractor's perspective the only pension cost incurred was his per-hour contribution to the pension plan.

THE PROBLEMS CREATED BY THE 1980 MULTIEMPLOYER AMENDMENTS

Withdrawal Liability

Potential employer withdrawal liability presents severe consequences for workers covered by multiemployer plans. One problem is that mutliemployer pension plans are not attracting new contributing employers. The very nature of multiemployer plans assumes a steady influx of new employers to replace the employers who cease to contribute to the plan due to businesses being sold, owner retirement, bankruptcy, etc. However, given the potential for withdrawaly liability, new employers are avoiding involvement with multiemployer plans. The reluctance of new employers to contribute to such plans may eventually spell the demise of existing multiemployer plans. As a result of the disincentive associated with potential or actual withdrawal liability, the plan may suffer an ever-decreasing contribution base eventually resulting in plan insolvency.

The administrator of one construction industry pension fund covering much of the southern half of the United States recently noted that despite a fully-funded status (in other words, the plan has no unfunded vested liability) the "perceived" potential for employer liability under the 1980 amendments was keeping new contributors away. The 1980 amendments are thus contributing to the deterioration of the contribution base of a well-funded, well-administered plan.

Another threat to the long-term soundness of existing multiemployer plans is the effect that potential withdrawal liability may have on the bonding and credit capacity of currently contributing contractors. Although the Financial Accounting Standards Board (FASB) has yet to determine the financial statement treatment of potential liability to multiemployer plans, there is a great deal of apprehension in the bonding and financial community. Already, some contractors have been questioned at length about potential withdrawal liability by their lending institutions.

It is very important to note that under certain circumstance construction contractors may also face withdrawal liability under the general statutory rules provided in the 1980 amendments. The construction industry withdrawal rules apply automatically only to contractors contributing to construction industry plans. Non-construction industry plan (e.g., teamster plan) trustees must, voluntarily, adopt the construction industry rules if such rules are to apply to contracting contractors.

To date, various teamster plans have not adopted the construction industry rules, and contributing construction contractors are facing potential withdrawal liability solely as a result of a project being completed. A contractor who comes into an area and provides gainful employment to local workers, as well as significant contributions to the pension plan, is penalized by the assessment of withdrawal liability when that project is completed. In fact, the larger the project is (and the more the contractor has contributed to the local pension plan) the greater will be his withdrawal liability.

It is important not to underestimate the potential impact of employer liability on the construction industry. AGC is currently conducting an inventory of construction industry pension plans which has already disclosed that 84 of the 154 respondent plans have unfunded vested liability amounting to $3.6 billion. This does not include the $5.2 billion of unfunded vested liability maintained by the two large teamster plans (Western Conference Teamsters and Centeral States Teamsters). This huge level of unfunded vested liability is having, and will continue to have, a negative impact on multiemployer plans and the workers who depend on these plans for retirement income.

Joint Trusteeship of Multiemployer Pension Plans

One of the great weaknesses of both the 1980 amendments and the original plan termination provisions of ERISA was the inability of Congress to effectively differentiate between single and multiemployer plans. Multiemployer plans are essentially partnerships, albeit unique ones. The involved union and management groups designate an equal number of representatives to serve as trustees of each plan. Once designated, the trustees function in a relatively independent manner in keeping with their fiduciary obligation to represent the "best interests of plan participants and beneficiaries." This "partnership" is best described as "delicate," given the fiduciary requirements placed on trustees. Historically, and until the passage of the 1980 amendments, this partnership has worked fairly well.

The 1980 amendments to ERISA upset this delicate partnership by drastically changing the rules. These amendments have resulted in an unbalanced partnership by creating one partner (the union) who has everything to gain and nothing to lose and leaving the other partner (the employer) with everything to lose. Union trustees have every reason to represent their constituency (union members) and thereby to seek benefit increases. At the same time, management trustees are prevented from representing the interest of contributing employers (See, NLRB v. Amax Coal Company, U. S. Supreme Court No. 80-692, June 29, 1981) despite the fact that employers have unilateral liability for promised benefits. To force such an unfair, costly partnership on any businessman is inequitable and inappropriate.

It is important to keep in mind that at the time most employers entered this partnership there was a relative balance in the partnership. While trustees have long had a responsibility to plan participants and beneficiaries, both unions and employers considered the agreed-to, per-hour contributions to be the only responsibility of contributing employers. Thus, if promised benefits were ever to be actually paid, both union and management trustees had to ensure adequate funding.

It is also important to note that this "unbalanced partnership" does not necessarily mean that multiemployer plan trustees should not consider the impact of employer withdrawal liability on the long-term health of the plan. Given the possibility of employer withdrawal liability, both the courts and arbitrators have ruled that specific benefit increases are inappropriate when they increase unfunded vested liability and potential employer withdrawal liability.[1]

Labor Management Friction

The union sector of the construction industry is going through a period when the need for labor and management to work cooperatively is critical. The attention of both parties must be focused on resolving the true problems of union construction. Unfortunately, the 1980 amendments are creating unnecessary conflict between contractors and unions. The historical cooperative attitude that prevailed at plan trustee meetings has been replaced by confrontation and animosity. More than half a dozen construction plans around the country, including plans in Texas, Florida, California, and Illinois, have either arbitrated a benefit increase proposal or considered such action. One contractor trustee in Iowa returned to a jobsite and found $40,000 in damages to equipment after he voted to turn down a benefit increase proposal at a trustee meeting. Other contractor trustees have faced less dramatic, more subtle pressures.

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[1] Borden, Inc. v. United Dairy Workers Pension Program, N.D. Mich., C.A. No. 81-71372.

No. Texas Carpenters Pension Plan, AAA Case No. 71-62-0001-81, Charles H. Frost, Arbitrator, December 1, 1981

The atmosphere created by the 1980 amendments is unhealthy and against the best interests of union-represented employees -- the very employees the 1980 amendments were designed to protect.

Increased Multiemployer Pension Plan Administrative Expenses

The 1980 Multiemployer amendments have significantly increased the administrative costs of multiemployer plans. One construction industry plan in Louisiana has faced a sixty-six percent (66%) increase in consultant costs and has been notified that these costs "will continue to escalate as a result of the recent adoption of the Multiemployer Pension Plan Amendments Act of 1980." Many experts have called the 1980 amendments the "Attorneys and Actuaries Full Employment Act of 1980." The procedures to determine whether a withdrawal has occurred and the process for calculating liability are complex and costly to administer. In addition, many plans are faced with the substantial costs of arbitration and litigation.

Legal Challenges

To date more than 68 suits have been filed challenging the constitutionality of the 1980 amendments. Fifteen of these suits (see attached list) involve construction-related firms. Together these 68 firms have been assessed more than $40 million in withdrawal liability. The suits filed to date challenge the constitutionality of the 1980 amendments on various grounds including contract impairment, denial of procedural due process, the taking of property without just compensation, vagueness, and retroactivity.

The 1980 Amendments Are Not Preserving Today's Multiemployer Plans

The 1980 multiemployer amendments were supposedly designed to secure the future of the typical "fixed-contribution/defined-benefit" multiemployer pension plan. Despite the stated purpose, employers and unions in various parts of the country have already agreed to gradually phase out their existing plan or to convert their current pension plan to a defined-contribution plan. The Southern California Cement Masons Plan, the Western Washington Carpenters Plan, and many others are working to fully fund their plans and convert to defined contribution plans (plans which are very similar to individual retirement accounts).

AGC is not opposed to the conversion to defined contribution plans. As a matter of fact, because of the potential liability created by the 1980 amendments AGC has encouraged contractors and unions to consider this option. The critical question is "If Congress truly considered the typical multiemployer plans to be worth saving, how can a law which is forcing management and labor alike to abandon such plans be considered as working properly?" Rather than preserving today's multiemployer pension plans, the 1980 amendments are encouraging their ultimate disappearance.

S.1748 Offers a Reasonable Solution

S.1748 would remove the typical construction industry multiemployer pension plan from the burdensome withdrawal liability provisions of Title IV of ERISA. At the same time the improvements to the plan funding and delinquent contribution collection provisions of Title IV which were in the 1980 act will remain. S.1748 also allows plan trustees to take the one step which will truly guarantee the pension benefits of covered employees --trustees will be able to improve the funding level of the plan. The removal of multiemployer plans from the burdens of the 1980 amendments will allow multiemployer plan trustees to address the funding question unencumbered by the discentives associated with Title IV.

If S.1748 is enacted, plan trustees will be required to act reasonably and the delicate balance of the labor-management partnership will be restored. Multiemployer pension plans will again be a desireable alternative for providing retirement income. AGC is committed to the continuation of construction industry multiemployer pension plans and has begun an effort to educate and encourage plan trustees and construction bargainers to work toward better funding of these plans. Only by providing adequate funding will the benefits of covered workers be truly protected and the continued financial stability of these plans be insured. AGC's educational effort has included informational bulletins, seminars, and a 69-page manual (copy attached).

In summary, we strongly encourage this subcommittee and the full Senate to give immediate favorable consideration to S.1748. Only by removing the current inequities and disincentives of the 1980 amendments will workers truly receive the retirement income protection they deserve.

Attachment

Construction Industry Litigation Contesting the Constitutionality of the 1980 Multiemployer Pension Plan Amendments Act

Alan C. Ells Construction, Inc. v.
Construction Laborers Pension
Trust For Southern California

C.A. No. 81-4910 (C.D. Cal., filed September 18, 1981)

Bakersville Concrete Construction, Inc., et al.
v. Construction Laborers Pension Trust for
Southern California

C.A. No. 82-044-WPG (C.D. Cal., filed January 6, 1982)

D. J. Drywall, Inc., et al. v. Orange
Belt Painters Pension Fund

C.A. No. 81-5330 (C.D. Cal., filed October 14, 1981)

E. E. Black, Inc. v. Hawaii Carpenters
Pension Trust Fund

C.A. No. 82-0045 (D. Ha., filed January 26, 1982)

G & R Roofing Co. v. Carpenters Pension
Trust for Southern California

C.A. No. 81-5551 (C.D. Cal., filed October 27, 1981)

Gangi Construction Co., et al. v.
Operating Engineers Pension Trust

C.A. No. 0043 RJK (C.D. Cal., filed January 27, 1982)

Gray & Co. v. Oregon-Washington Carpenters-
Employers Pension Trust Fund and The
Pension Benefit Guaranty Corporation

C.A. No. 81-912 (D. Ore., filed September 29, 1981)

Malcclm Boring Co., Inc. v. Operating
Engineers Pension Trust

C.A. No. 81-6046-TJH (C.D. Cal., filed November 27, 1981)

Manning Bros. Rock & Sand Co. v. PBGC, et al.

C.A. No. CV-81-6123 (C.D. Cal., filed December 3, 1981)

RCB Construction, Inc., et al. v. Silver, et al.

C.A. No. CV-81-5350 (C.D. Cal., filed October 27, 1981)

S & M Paving, Inc. v. Construction Laborers
Pension Trust for Southern California

C.A. No. 81-5929 (C.D. Cal., filed November 19, 1981)

Sheet Metal Workers Union Local #10 Pension
Fund v. Homco Mechanical Contractors

C.A. No. 81-0749-L(A) (W.D. Ky., filed December 10, 1981)

Shelter Framing Corp. v. Carpenter's Pension
Trust for Southern California

C.A. No. 81-4457 (C.D. Cal., filed August 28, 1981)

Victor Construction Co. v. Construction Laborers
Pension Trust for Southern California

C.A. No. 81-5144 (C.D. Cal., filed October 2, 1981)

Woodward Sand Co., Inc. v. Operating
Engineers Pension Trust

C.A. No. 81-920-N(I) (S.D. Cal., filed September 23, 1981)

Senator NICKLES. You have no problems with withdrawal liability until the time you withdraw from the plan?

Mr. KRAFT. Except that we are faced with the potential of the big eight accounting firms ultimately pressed into the corner to make a decision. Up to the present time, that position, I think, can best be assessed as having almost swept it under the carpet, waiting for Congress, for the industry to settle down.

Senator NICKLES. If you are selling your business, is it mandatory under the contracts that you have with the plumbers and others, that you contribute to the plan, as such, and if you did come up with an actual equivalent of your best benefit to date, and we will fund that as the base for your defined contribution plan, if you come up to a very agreeable situation with your people, could they still be members—would you be automatically cast out of the union? Would that be a decertification voluntary if that happened?

Mr. KRAFT. Absolutely.

Senator NICKLES. Basically, you are required to stay in the same type of defined contribution with defined benefit liabilities, and any time you broke away from that, even though you are in construction, you would still be assessed with that withdrawal liability?

Mr. KRAFT. That is correct.

Senator NICKLES. I appreciate your amplifying that because I think some of the previous comments might have led one to think that all people in the construction industry would be very pleased to leave it just like it is because they are exempt. But they are not exempt if they should want to bargain out, or a decertification, or anything of that nature.

Yes, Mr. Richards?

Mr. RICHARDS. We have cited two instances in our formal testimony of situations where there was a withdrawal and that substantial liabilities were incurred, and these are both construction industry cases. They are cited on page 8.

Senator NICKLES. Is that where they went from union to nonunion?

Mr. RICHARDS. No, this was after an employer's collective bargaining agreement expired, and they could not renegotiate an agreement, and not being able to reach a new agreement, they were assessed in excess of $264,000 in withdrawal liability, which is equivalent to 31 percent of their net worth. That was the first instance. So, it was a question of not being able to continue a negotiation toward a new agreement.

Senator NICKLES. Mr. Hall, did you participate in negotiations on the 1980 Act?

Mr. HALL. Yes, sir.

Senator NICKLES. Do you feel if changes are made today, that you are "betraying" an agreement that was reached?

Mr. HALL. No, I do not feel it's a question of that. In 1980, we were faced with the alternative of taking the compromise which was reached—but not very happily agreed to by anybody—or going back to the 1974 act, as has been interpreted by the courts in 1978, which was the real fatal blow, as has been pointed out.

So, given the Hobson's choice, we took the support of the 1980 amendments.

Senator NICKLES. Thank you, Mr. Wilkinson.

Gentlemen, I will ask this question as a panel. This panel is coming from the construction industry primarily, is that correct?

Mr. WILKINSON. Yes.

Senator NICKLES. In other words, you are primarily exempt from withdrawal liability today.

Mr. WILKINSON. No, we are not exempt from withdrawal liability, sir. In the case of the contractor who continues to do business in the area, generally, he continues to have withdrawal liability, if he withdraws from the plan, but continues to perform business in the area. There are further exceptions to that.

Senator NICKLES. You would find it impossible to negotiate away from the defined benefit plan, as Mr. Hall was discussing, into a defined contribution plan or individual retirement plan, or something like that?

Mr. WILKINSON. Would some of you who are negotiating currently answer that?

Mr. KRAFT. There is no way, Senator, that you can negotiate out of that liability that exists up to this point. If you take that action today, you are still liable for the liability up to this point.

Senator NICKLES. Let's say you came up—Mr. Kraft, is that correct?

Mr. KRAFT. Correct.

Senator NICKLES. You have what company and what union?

Mr. KRAFT. I am a small employer in Arizona. We have participation in three different plans, two local, one with the plumbing industry, one with the sheet metal industry, one national with the sheet metal industry.

Senator NICKLES. How many employees altogether?

Mr. KRAFT. My employees are 130.

Senator NICKLES. You bargain, I guess, individually with each three different unions?

Mr. KRAFT. Basically, we bargain with two unions, the plumbing organization and the sheet metal organization. We represent—in our local plans in Arizona—we represent the State of Arizona, not just the local Phoenix plan.

I think that the important thing here is to get down to what happens at the local level. Mr. Wilkinson touched on it. The trustees of a plan are made up of the trustees from the local union who are, by and large, either near retirement age or already retired.

The trustees of the management plan are made up of management trustees, many of whom are past union members, who have vested rights in a pension plan, so they are already biased in their opinions. These are the people who are trusted with making the decisions about the liabilities of the plan, and spend the $1, $1.50, or whatever it is, contributed per hour.

These people make those decisions. So, when you bring this down to the small plan, I understand that, and I know what the problems are, and those problems are simply magnified by thousands of other plans just like them across the country.

When you look at the overall view from here, it may seem like you have to talk about large numbers. You do not have to. All you have to do is to talk about any one of these small plans in a local area, and that simply then is multiplied by the hundreds of plans.

Senator NICKLES. Mr. Wagner or Mr. Kraft, did either of you feel like you participated in the negotiations in 1980?

Mr. CURRY. My name is Jim Curry. I am from Boston. I don't know what I am doing here, being Irish, not to be up in Boston on March 17, St. Patrick's Day, but it is this serious for me to be here.

Senator Cohen had alluded to the contractor, the small grassroots contractor. Well 56 years ago, my father didn't have a job, took a shot, went into business with a $200 loan from a supply house.

We built the business up. We are doing around $20 million today through trial and error, which is not the biggest in the industry, but we are small entrepreneurs that come up to the point. We deal with 15 different funds in a 150-mile radius in the Massachusetts area from the center of our base of operation. If anything happens to any one of those two funds, bang, there goes 56 years of hard work. The small business is the backbone of this country, and it's going to croak a lot of us. Something has to be done, Senator.

Senator NICKLES. I appreciate your comments. Gentlemen, we appreciate your participating before the panel, and we wish to have your continued expertise as we hopefully come up with something that we can move through Congress.

Senator NICKLES. On the next panel we have Richard Cohn from Portland, Oreg., John Mathews, of OK Delivery System; John Godsey from California with the Sierra Pacific Corp.; and Lester Smith and John Zenor, also from Portland, Oreg.

Gentlemen, we welcome you, and Mr. Cohn, if you would care to proceed, we would appreciate it.

STATEMENT OF RICHARD E. COHN, OWNER, COHN BROS. FURNITURE CO., PORTLAND, OREG.; JOHN J. MATHEWS, PRESIDENT, OK DELIVERY SYSTEM, INC., PORTLAND, OREG.; JOHN A. GODSEY, JR., CORPORATE PERSONNEL DIRECTOR, SIERRA PACIFIC CORP., ARCATA, CALIF.; LESTER V. SMITH, JR., AND JOHN L. ZENOR, PARTNERS IN THE LAW FIRM OF BULLARD, KORSHOJ, SMITH & JERNSTEDT, P.C., PORTLAND, OREG.

Mr. COHN. Thank you, Senator Nickles.

My name is Richard Cohn. I am a small businessman from Portland, Oreg. By way of background, my family has been in the furniture business for some 83 years both in manufacturing and most recently in the retail business. We have provided over 80 full-time jobs.

Since 1953, some of our employees have been represented by the Teamsters Union. We always bargained in good faith for wages and contributions to health and welfare and pension plans.

We never guaranteed that the Teamsters pension would be solvent or would fund the benefits promised by the pension plan to its beneficiaries any more so than the teamsters would guarantee that we could operate profitably and stay in business.

Due to a declining economy, high interest rates and operating costs, we were forced to sell our company. Our concern was to minimize our loss and try to insure a place to work for our employees.

In late August 1980, we found such a buyer and reached informal agreement for the sale of our company. At that time, there was no Multiemployer Pension Plan Amendments Act.

The sale documents were signed in December 1980. This sale generated a probable withdrawal liability in excess of $150,000 which represents my entire equity in the company.

When we finally learned about the 1980 Pension Act, we were dumbfounded. How could Congress under our Constitution impose a financial penalty on a small business like ours, converting our property into the property of the pension plan to correct problems within the plan which were out of our control?

Furthermore, how could we be made a party to the pension plan's agreement with our employees? Our agreement was with the Teamsters Union to provide contributions, not to guarantee benefits.

I hope that Congress will focus on a solution to the lack of funding in the pension trusts by making the trustees act in a more responsible manner. Let us go to the source of the problem so that the Federal Government and American businesses will not have to assume the responsibility for the plans' funding deficiencies.

I hope the multitude of lawsuits which have been filed will let the trustees know that small businesses are not the treasury to solve problems created by the pension funds.

In business, you do not add more inventory when you cannot pay for what you have, so why do trustees continue to hand out more benefits when their plans are already underfunded?

In business, you do not survive if you promise one thing and deliver another. Then why are the trustees allowed to tell us for years that they will make all the benefit decisions, and now tell employers to pay a huge withdrawal liability to guarantee those benefits?

In business, you do not make acquisitions or mergers if you incur hidden liabilities. In my new business ventures, I will never again participate in a multiemployer pension plan because of my experience with this law.

Therefore, on behalf of myself and other small businessmen, I urge the Senate to adopt Senator Hatch's bill or other relief legislation.

Senator NICKLES. Thank you, Mr. Cohn. We appreciate your input.

Mr. Godsey.

Mr. GODSEY. Mr. Chairman, my name is John A. Godsey, Jr., and I am the corporate personnel director of Sierra Pacific Industries. I want to briefly explain to you the tremendous negative impact the passage of the Multiemployer Pension Plan Amendments Act has had on our firm and how this act is reducing employment opportunities and job security for our employees.

Sierra Pacific Industries is a medium-sized lumber and millwork manufacturer with over 1,500 employees working at 10 facilities located in small communities throughout northern California.

The company was founded in 1950 by the father of our president, and it continues today as a family concern. Our growth from a five-man firm to our present size was substantially aided by our actions in purchasing the closed or closing operations of other employers.

After each purchase, we would aggressively invest substantial amounts of capital in modernizing and improving obsolescent facilities to make them more productive and competitive.

Through this process, we were successful in preserving and creating hundreds of jobs for individuals within our communities.

Prior to 1980, the employees of our Redding location had been represented by the Lumber & Sawmill Workers Union for over 30 years. As a part of our initial collective-bargaining agreement in 1970 with the Lumber & Sawmill Workers Union, we agreed to assume the contract obligations and responsibilities of the prior employer.

A provision of that agreement required us to contribute to the lumber industry pension fund as had the prior employer back to the 1961 beginning date of the fund.

During the 20-year period in which our employees were covered under this fund, we, and our predecessors, promptly paid all negotiated contribution amounts.

In March of 1980, we were advised by the NLRB that our Redding employees had filed a petition for an election to determine the representative status of the Lumber & Sawmill Workers Union.

Subsequently, the NLRB scheduled an election for May 8, 1980. A small majority of the employees voted to decertify the union. As a result of their vote, we thereby lost the right to contribute to the lumber industry pension fund.

Later in September, the Multiemployer Pension Plan Amendments Act was enacted into law. The passage of the act not only imposed enormous and unwarranted potential liabilities on employers participating in these plans, it also made these liabilities retroactive to April 28, 1980.

The retroactive application of this law, which is by far not the normal procedure followed by Congress, covered the involuntary withdrawal caused by our employees' vote on May 8.

We have been informally advised that our liability resulting from our employees' exercise of their legal rights may approach $750,000. We must note that this amount does not and will not reflect the substantial reduction of previously vested benefits incurred by our employees because of their withdrawal.

We have attempted to minimize any negative impact on our employees by immediately covering them under our own retirement plan which provides for higher contributions and more rapid vesting than the lumber industry pension fund.

In summary, we believe it is outrageous and manifestly inequitable for our firm retroactively to become subject to enormous financial penalties when we were and are legally restrained from taking action to minimize our liability.

In addition, the imposition of this unwarranted penalty reduces our employees' security in future employment without in any way securing or guaranteeing their retirement benefits or the benefits of other remaining Sierra Pacific employees covered by the lumber industry pension plan.

Further, it would be foolish on our part to purchase any additional facility or expand operations when such action might lead to a substantial increase in our potential withdrawal liabilities.

Thank you.

Senator NICKLES. Thank you very much.

Mr. MATHEWS. Mr. Chairman, I am John J. Mathews. I am president of OK Delivery System, a small trucking business located in Portland and doing business in Oregon and Washington.

We have about 75 employees, most of whom are members of the International Brotherhood of Teamsters. We make pension contributions on the Teamster employees, and have for the 32 years that my family and I have owned the business.

To give you a little further perception of where I am coming from, I not only am the president of my own organization, but have, over a period of some years, served as president of local, State and national trade groups. Moreover, I have served as a trustee in the largest Teamster health and welfare trust in Oregon, but not on the pension trust for the Western Conference.

In all those capacities, I think I have had a good track record of having advocated strong employee benefit programs, and not been seen as an enemy of multiemployer pension plans at all.

Back in 1974 when the ERISA was enacted, as a matter of fact, and there was much outcry in the industry, I counseled a good many of my colleagues that, in the long run, it would be a good thing for the plans.

I became something of a laughingstock when subsequently we got hit with something that the Western Conference of Teamsters pension plan called the "7 cent nickel."

Under that, the plan trustees said that the mandate of Congress required them to diminish the unfunded vested liabilities, and so we would get hit with a 40-percent increase in our contribution rate without any increase in the benefit levels to the employees or retirees.

Then along came 1980 and when MEPPA came up, it happened that a member of our family was then sitting in Congress. He called me and told me what was cooking, and he said he wished he could get some help with interpreting the thing.

Once more, I made the bad judgment of saying I had looked at the bill; that it appeared that the thrust of it was to try to protect the integrity of the funds; and that it seemed aimed primarily at preventing unscrupulous employers from selecting against trusts, and opting out in a way that would damage contributors like ourselves who intended to remain in.

Then, when the bill had been passed, about 4 or 5 months went by, and our labor counsel called me and said, "We have just become aware of what some of the implications are," and he proceeded to outline the withdrawal hazards that were particularly and dramatically testified to last week by certain of the trucking people.

Now, our understanding, Senator, was that those laws were enacted to protect the retirees from unscrupulous employers, but in point of fact, the laws have left the pension plan trustees free to perpetuate and extend the very practices that have led to unfunded vested liabilities in the first place.

To be specific, one is the practice of raising benefit levels without negotiating corresponding increases in contribution. Another is annexing, as happened recently in our particular plan, other financially troubled plans. In this case, the Western Conference pension trustees just annexed from San Francisco a plan that is going to increase the unfunded liability of our plan by $50 million. There was no legal compulsion to do that. It was done for reasons of union politics.

No employer had a vote on it. We did not have any right to negotiate. We do not have any right of appeal. We are simply stuck with the additional unfunded vested liability.

Senator NICKLES. Is that a Teamster's plan? What plan is that?

Mr. MATHEWS. It is the San Francisco Local 85 Drivers' & Helpers' Pension Trust.

Senator NICKLES. Go ahead.

Mr. MATHEWS. Worst of all, and probably accounting for the largest part of the unfunded vested liabilities in our particular plan, however, has been the practice of granting fictitious prior service credits to new acceptions to the plan.

A man comes into—it does not have to be a man, it could be a woman—an employee comes into the program and for his first 10 years is granted 2 years of service credit for each year that he or she serves.

Well, that is like going to New York Life and saying, "Hey, I would be happy to buy your annuity plan if you will just treat me as though I have been paying premiums for the last 10 years."

Senator NICKLES. Would you repeat that again? How does that work? You get 2 years credit for 1 year of service?

Mr. MATHEWS. The way I understand the present rule, Senator, is that for each year of actual service that a new employee serves under coverage in the program he is granted 2 years of credit.

So that at the end of 10 years, his pension entitlement is the same as if he had actually worked for 20 years under the program.

Senator NICKLES. Could you supply this subcommittee with a copy of that plan document?

Mr. MATHEWS. Yes. I do not happen to have that document with me.

[The material referred to follows:]

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OK DELIVERY SYSTEM, INC.
John J. Mathews, President

April 20, 1982

United States Senate
Committee on Labor & Human Resources
ATTN: Mr. Powell - Room 4230
Washington, DC 20510

Dear Mr. Powell:

As requested by Senator Nickles during my March 17 testimony before the Committee, enclosed is an excerpt from the Western Conference of Teamsters Pension Plan which sets forth the Plan's policy re past service credits.

While the language is so technical as to require a pension expert's assistance in arriving at even a general comprehension, the document does confirm my testimony to the effect that the Plan even now grants as much as 10 years of ficticious service credit to an employee who comes under Plan coverage. (Page 9, Section 3(a) table).

If I can supply anything further that might be useful in the Committee's deliberations, please let me know.

Cordially,

John J. Mathews

John J. Mathews

JJM:tb

Enclosures - as named

cc - John Zenor
Les Smith
Jack Stewart
Gary Eichman
Dick Swennes
Renn Patch

TRUCKING

WAREHOUSING

POOL DISTRIBUTION

Section 6.—Effect of Plan's Prior Break-in-Service Rules:

In determining an individual's status, eligibility for, and amount of benefits under the Plan, there also shall be disregarded all periods of Employment, Past Employment, Supplemental Service and Service, Years of Vesting Service, Covered Hours, Past Service Credits, Future Service Credits and Employer Contributions completed, earned, accrued, paid or payable with respect to the individual before January 1, 1976, which would have been disregarded under the Plan's break in service rules as in effect from time to time prior to that date. For this purpose, the term "break in service rules" includes, without limitation, rules which result in the loss of prior vesting service or benefits of an individual, or which deny an individual eligibility to participate by reason of separation of service or failure to complete a required period of service within a specified time. For purposes of this Section, the provisions of Pension Agreements pertaining to these subjects shall be considered break in service rules of the Plan.

Section 7.—Effect of Plan Member's Death Before Retirement:

Notwithstanding any Plan provision to the contrary, no retirement or other benefits shall be payable to or with respect to an individual, whether or not a Vested Participant, who dies before the effective date of his retirement benefits, or to any person claiming by, through or under said individual or his estate, personal representatives, heirs, or beneficiaries, except as expressly provided in Articles VIII, X and XI.

ARTICLE IV. SERVICE CREDITS AND BENEFIT CONTRIBUTION RATES.

Section 1.—Service Credits:

A Plan Member's Service Credits shall include his Future Service Credits (including any fractional Future Service Credit) and his Past Service Credits (including any fractional Past Service Credit), if any..

Section 2.—Future Service Credits:

A Plan Member shall earn Future Service Credits based on the number of Covered Hours he has accumulated for which Employer Contributions are made on his account to the Trust Fund. A Plan Member shall accumulate one full Future Service Credit per 1,875 Covered Hours (1/1875th Future Service Credit per Covered Hour).

Subject to Section 4., a Plan Member who has Supplemental Service shall be entitled to additional Future Service Credits as provided in this paragraph if at the time of reference he is eligible for Age Retirement Benefits under Article VI and if he does not have a Break in Covered Employment before the date he first becomes so eligible. Such Plan Member shall accumulate additional Future Service Credits at the rate of two full Future Service Credits per 1,875 Covered Hours (2/1875ths of a Future Service Credit per Covered Hour), but the number of additional Future Service Credits may not exceed the smaller of:

(a) the number of his years (and fractions thereof) of Supplemental Service; and

(b) 18-1/3 minus his Past Service Credits.

Section 3.—Past Service Credits:

(a) Subject to Section 4., a Plan Member who has Past Employment shall be entitled to Past Service Credit as explained below if at the time of reference he is eligible for Age Retirement Benefits under Article VI and if he does not have a Break in Covered Employment before the date he first becomes so eligible. Such Plan Member shall be entitled to one full Past Service Credit for each year of Past Employment (one-twelfth of a Past Service Credit for each completed month of Past Employment) subject to the limitations described in the following table:

If the Plan Member's First Covered Hour is in	Then the Maximum Number of Past Service Credits is
1973 or before	18-1/3
1974 through 1979	Smallest of: (a) 18-1/3, (b) Twice the number of his Future Service Credits, (c) Greater of 10 and the number of his Past Service Credits from Past Employment before 1974
1980 or after	Smaller of: (a) 10, (b) Twice the number of his Future Service Credits

(b) Notwithstanding any other provision of the Plan to the contrary but subject to the other provisions of this subsection (b), no Plan Member, regardless of the date of his first Covered Hour, shall be entitled to Past Service Credits for any Past Employment based on Employment which is recognized by another pension plan for purposes of computing the amount of the Plan Member's retirement benefits under such plan. The limitation in the preceding sentence will apply to a Plan Member only (i) if on the date of his first Covered Hour under the Plan the other pension plan (A) is a multiemployer, defined benefit pension plan (as those terms are defined in section 3 of the Employee Retirement Income Security Act of 1974, as amended), (B) is subject to the joint administration requirements of section 302(c)(5) of the Labor-Management Relations Act of 1947, as amended, and (C) is maintained primarily pursuant to one or more collective bargaining agreements covering Employees represented by one or more Unions, and (ii) if on such date no more than 50 per cent of the Employees covered by the other plan are also Covered Employees under this Plan. Notwithstanding the foregoing provisions of this paragraph but subject to the modifications contained in Article IV, Section 4., the Normal Retirement Benefit on any date after October 31, 1980, of a Plan Member affected by this subsection (b) cannot be less than his Normal Retirement Benefit on October 31, 1980, determined under the terms of the Plan as in effect on October 31, 1980. (However, if his Normal Retirement Benefit on October 31, 1980, is determined under Section 1.(b) of Article V, his Final Pension Agreement Contribution Rate on the earlier of the date his Normal Retirement Benefit is being determined or December 31, 1984, shall be used if it is less than his Final Pension Agreement Contribution Rate on October 31, 1980.)

Section 4.—Cancellation of Service Credits Based on Past Employment or Supplemental Service:

Notwithstanding the Transition Provisions or any other provision of the Plan to the contrary, if an individual (regardless of whether he is or thereafter becomes a Vested Participant) ceases to be credited with Covered Hours because his Employer discontinues contributions to the Trust Fund on his behalf after February 28, 1977, for any reason other than a change in the individual's job classification, or a change in the place at which or in which the individual performs duties for the Employer, or the individual's quit, discharge, disability, retirement or death, then the individual shall not be entitled to Past Service Credits based on Past Employment with, or Future Service Credits based on Supplemental Service with, such Employer or any predecessor in interest of such Employer (or to any Retirement Benefits based on such Service Credits) unless:

(a) the individual earns at least four-fifteenths of a Future Service Credit in the period beginning with such discontinuance and ending with the third Plan Year immediately following the Plan Year of such discontinuance, or

(b) the Trustees determine that such discontinuance resulted from bankruptcy or other cessation of business of the discontinuing Employer.

Section 5.—Five-Year Average Contribution Rate:

A Plan Member's Five-Year Average Contribution Rate on any date is determined in three steps. Only Employer Contributions and Covered Hours through that date are taken into account. First, the five most recent Plan Years beginning before such date (which may include the Plan Year in which such date falls) are selected in each of which Employer Contributions were made on account of the Plan Member for at least 500 Covered Hours ("500 Covered Hour Years"). Second, the Plan Member's average contribution rate in each of those 500 Covered Hour Years is calculated by dividing the total Employer Contributions made on account of the Plan Member for Covered Employment during the Plan Year by the number of Covered Hours during the Plan Year for which Employer Contributions were made. Third, the Plan Member's Five-Year Average Contribution Rate is calculated by adding together the Plan Member's average contribution rate for each of the five 500 Covered Hour Years and dividing the resulting sum by five.

If on January 1, 1979, the hourly rate of Employer Contribution under the Plan Member's Final Pension Agreement on that date was at least 140% of the hourly rate under that Pension Agreement on December 31, 1978, then the Plan Member's average contribution rate in any 500 Covered Hour Year before 1979 will be increased by 40% when calculating his Five-Year Average Contribution Rate.

If on any date the Plan Member does not have at least five 500 Covered Hour Years, then his Five-Year Average Contribution Rate on that date equals his Career Average Contribution Rate on that date.

A Plan Member's Five-Year Average Contribution Rate on any date after December 31, 1979, shall, if necessary, be reduced so that it does not exceed by more than 50 cents the Plan Member's highest Five-Year Average Contribution Rate (after any reductions required by this paragraph) on the last day of any prior 500 Covered Hour Year beginning after December 31, 1978.

A Plan Member's Five-Year Average Contribution Rate on any date can never be less than his Career Average Contribution Rate on that date. However, for purposes of applying the limitation in the preceding paragraph, a Plan Member's Career Average Contribution Rate is deemed always to have been zero.

Section 6.—Final Pension Agreement Contribution Rate:

A Plan Member's Final Pension Agreement Contribution Rate on any date before January 1, 1985, shall be the Recognized Rate most recently applicable on or before such date under his Final Pension Agreement. A Plan Member's Final Pension Agreement Contribution Rate on any date after December 31, 1984, is zero. A Plan Member's Final Pension Agreement on any date shall be the Pension Agreement under which he worked during the period, consisting of the Plan Year which includes that date and the two preceding Plan Years, for all or the largest number of his Covered Hours in that period, provided he had at least 600 Covered Hours in that period. The Recognized Rate under a Pension Agreement on any date before January 1, 1980, is the hourly rate of Employer Contribution in effect under the Agreement on that date. The Recognized Rate under a Pension Agreement on any date after December 31, 1979, is the lesser of the hourly rate of Employer Contribution in effect under the Agreement on that date or the Recognized Rate for that Agreement on the same date in the prior Plan Year increased by 14 cents.

If on any date a Plan Member has less than 600 Covered Hours in the period consisting of the Plan Year which includes that date and the two preceding Plan Years, his Final Pension Agreement Contribution Rate shall be that determined in accordance with the preceding paragraph as of the most recent December 31 such that he had at least 600 Covered Hours in the period consisting of the Plan Year in which that December 31 occurs and the two preceding Plan Years.

A Plan Member's Final Pension Agreement Contribution Rate is subject to the following limitations. The Rate cannot exceed the Recognized Rate in effect for his Final Pension Agreement on the earlier of his final Covered Hour under that Agreement or December 31, 1984. However, if a Plan Member's final Covered Hour under his Final Pension Agreement is one year or less before the effective date of his Retirement Benefit under Article VI or Article VII, the Recognized Rate in effect on the earlier of such effective date or December 31, 1984, will apply.

If a Plan Member's Final Pension Agreement is a Seasonal Pension Agreement, then for purposes of determining his Final Pension Agreement Contribution Rate, the hourly rate on any date under such Agreement is deemed to be the lower rate of Employer Contributions under such Agreement on such date.

If on any date a Plan Member does not have at least 600 Covered Hours in the period consisting of the Plan Year which includes that date and the two preceding Plan Years or in any period consisting of three consecutive Plan Years all of which end before that date, his Final Pension Agreement Contribution Rate is his Career Average Contribution Rate on that date.

Section 7.—Career Average Contribution Rate:

A Plan Member's Career Average Contribution Rate on any date is obtained by dividing the Employer Contributions made on the Plan Member's behalf for Covered Employment through that date by the Plan Member's Covered Hours through that date for which Employer Contributions have been made. If on January 1, 1979, the hourly rate of Employer Contribution under the Plan Member's Final Pension Agreement on that date was at least 1[illegible]0% of the rate under that Agreement on December 31, 1978, then the Plan Member's Employer Contributions for Covered Employment before January 1, 1979, will be increased by 40% when calculating the Plan Member's Career Average Contribution Rate on any date after December 31, 1979.

ARTICLE V. NORMAL RETIREMENT BENEFIT.

Section 1.—Normal Retirement Benefit:

Subject to the provisions of Sections 6. and 7., a Plan Member's Normal Retirement Benefit on any date after December 31, 1979, shall equal the greater of:

(a) the sum of (i) the Plan Member's Schedule A Accrued Retirement Benefit on that date under Section 2., (ii) any Schedule A Additional Future Service Benefit the Plan Member may be eligible for on that date under Section 3., and (iii) any Schedule A Past Service Benefit the Plan Member may be eligible for under Section 4.; provided that the sum of (i), (ii) and (iii) shall not exceed the Maximum Retirement Benefit shown on Schedule A for the Plan Member's Five-Year Average Contribution Rate on that date; or

(b) the sum of (i) the Plan Member's Schedule B Accrued Retirement Benefit on that date under Section 2., (ii) any Schedule B Additional Future Service Benefit the Plan Member may be eligible for on that date under Section 3., and (iii) any Schedule B Past Service Benefit the Plan Member may be eligible for under Section 4.; provided that the sum of (i), (ii) and (iii) shall not exceed the Maximum Retirement Benefit shown on Schedule B for the Plan Member's Final Pension Agreement Contribution Rate on the earlier of that date or December 31, 1984.

Subject to the modifications contained in Article IV, Section 7., of the 1979 Plan, a Plan Member's Normal Retirement Benefit on any date after 1979 cannot be less than his Normal Retirement Benefit on December 31, 1979, determined under the terms of the 1979 Plan using a Benefit Contribution rate equal to the lesser of his Benefit Contribution Rate on December 31, 1979, or his Final Pension Agreement Contribution Rate on the earlier of the date his Normal Retirement Benefit is being determined or December 31, 1984.

Subject to the provisions of Section 4. of Article IV, the Normal Retirement Benefit on any date of a Vested Participant who has attained age 55 cannot be less than the Age Retirement Benefit he would have been eligible to receive if he had retired under Article VI on any earlier date.

Senator NICKLES. Is that another Teamster plan?

Mr. MATHEWS. It is a Teamster plan, Western Conference of Teamsters pension plan.

The result of all this is that we have the withdrawal problem hanging over us. If I tried to sell the company today, it would be unsalable. I feel very much—and I think other companies like mine are in exactly the same position—I feel very much like a man who has made mortgage payments on his home for 32 years. He has met all his mortgage deadlines. He goes to the bank with the final payment, and the bank says, "Not so fast. Congress now says we are going to stick you with a pro rata share of all the defaults that we absorbed during those 32 years."

Now, to me there is nothing fair or reasonable about that. In my individual view and the view of the groups that I represent—Oregon Draymen & Warehousemen's Association, the Oregon Trucking Association, and the Northwest Short Haul Carriers—the simplest and most straightforward solution is Senate bill 1748.

We have been told that as a political reality it is not very likely of passage, but whatever remedy is finally adopted, I would suggest that it not only address the defects that the committee has heard—the impact of the withdrawal liability and so forth—but that it also establish some kind of burden of responsibility on the trustees, who are the underlying cause of the problem in the first place.

And I would, finally, in closing, ask that the problem be viewed not in terms of a conventional labor-management dispute—a shin kicking contest—but rather that the committee recognize and the Congress as a whole recognize that we, as employers, who make 100 percent of the contributions, and our employees, who are hoping to retire on those contributions, are in the same boat.

The culprits in this thing, as I perceive it, are the trustees who have given away the farm.

Thank you, sir.

Senator NICKLES. Thank you, Mr. Mathews. We appreciate it.

Mr. Smith.

Mr. SMITH. My name is Lester Smith. I am a partner in the Portland law firm of Bullard, Korshoj, Smith & Jernstedt. Our firm limits its practice exclusively to representing management in labor law matters.

Our clients include a variety of companies and firms with collective bargaining agreements which include multiemployer pension trusts from a vast area of industries, trucking, construction, service, retail and manufacturing.

Victor Atiyeh, who is the Governor of Oregon, has a motto that he uses when he is discussing or considering proposed amendments to existing statutes. It is very simple: "If it works, do not try to fix it." Unfortunately, the evidence on the 1980 Multiemployer Pension Plan Amendments Act shows that that law is not working as written. It really does need to be fixed and it needs to be fixed soon.

You have already heard witnesses testify on how the 1980 law is restricting and frustrating normal business planning and other transactions including sales, acquisitions, consolidations and mergers, situations that are common to the difficult times we are now in. I have outlined some tough problems faced by our clients in my written testimony. I will not go over those now.

The intent of the 1980 law was to keep employers in multiemployer pension plans. However, from a labor lawyer's view point, let me tell you what I have observed is happening in the real world.

First, employers faced with the opportunity to go into a multiemployer pension plan are universally deciding to stay out. Since October 1980, none of our clients have bargained into a multiemployer plan. As a basis for this statement I am talking about countless rounds of negotiations. Instead, companies and firms are negotiating into IRA's, profit-sharing plans and selected single-employer pension programs that avoid the problems with the 1980 law.

Second, many employers who have been under collective bargaining agreements signed before September 26, 1980, are opting out of multiemployer plans. This is particularly true if the plan is fully funded. Employers involved in plans that have unfunded liabilities are also getting out. These employers believe that it is better to get out now, cut their losses, take their lumps and litigate if necessary. However, they believe if they stay in the plan they will only find that their potential liability for the unfunded amount will increase the next round of negotiations along with the amount they need to contribute to the trust to keep it going.

I should also mention that in our practice we are also starting to see plan trustees moving toward what is commonly called the freeze and switch. This also may deal a serious blow to current multiemployer plans.

During the last 2 days, our northwest group has talked to many Congressmen and Senators. Our message is simple. As John Mathews indicates, the 1980 law does not present a problem between management and labor or a problem between employers and employees.

Instead, the aspect of unfunded vested liabilities under the 1980 law involves a problem caused by the unsound and sometimes the irresponsible actions of trustees.

Let me make it clear. I believe that the proposals made today by the Western Conference of Teamsters and the Teamsters Central States Pension Plan as a midcourse corrections represent good ideas. However, their proposed measures do not go far enough. We need legislation that will help and require trustees to better run their trusts and insure the millions of workers in the various plans will ultimately receive their benefits.

Unfortunately, it is a fact that despite high unfunded vested liabilities, trustees are continuing to grant prior service credits. It is a fact that despite high unfunded vested liabilities, trustees are lowering the age limits at which workers can draw benefits. It is a fact that despite high unfunded vested liabilities trustees are approving unrealistic actuarial rates on return of investment for their funds, sometimes as low as 5 and 6 percent. Such low amounts are preposterous in this day and age.

Finally, it is a fact that despite high unfunded vested liabilities and a decline in contributions from employees due to high unemployment, trustees continue to grant higher benefit levels.

The current law needs to be amended. It needs to be fixed by the process of rational fine tuning. The practice of placing blank checks in the hands of the trustees must be stopped. As others have testified, it is unfair to penalize an employer for the wonderings of pension plan trustees who are beyond the employers control. The 1980 law is not working as planned. Something must be done.

Senator **Nickles**. Thank you very much.

Did you have any additional comments that you wanted to add, Mr. Zenor?

Mr. **Zenor**. I have a very brief statement.

Senator **Nickles**. If you would please make it brief.

STATEMENT OF JOHN L. ZENOR

Mr. **Zenor**. I am John L. Zenor, also of the law firm of Bullard, Korshoj, Smith & Jernstedt in Portland, Oreg., specializing in the practice of labor law on the side of management. I certainly agree with the members of this panel and the other witnesses today that the 1980 law isn't fair to employess. However, in my presentation today I want to focus on a different issue—whether the 1980 law really does protect employee and retiree rights. My experience in representing a variety of companies in different industries leads me to conclude that the 1980 law is clearly having a boomerang effect. It is hurting employees, it is threatening retiree benefits, and it is destabilizing multiemployer plans, at the same time as it is putting this unfair burden on companies.

The 1980 law is hurting employees because many companies seeking loans from financial insitutions, seeking to sell all or a part of their business, or seeking new venture captial to preserve operations and to preserve employee jobs are doomed to failure, because of the specter of withdrawal liability under the 1980 law.

In addition, employees cannot freely exercise their statutory rights to decertify a union, or to choose a different union as their collective-bargaining representative, since the withdrawal liability generated by such a choice can force the closure of a business and consequent loss of jobs.

Moreover, the 1980 law in many cases exempts companies that go out of business entirely, and terminate all their employees, from withdrawal liability, but imposes that liability if an employer stays in business on a nonunion basis or with different union. This is an incentive for companies to terminate employees rather than try to stay in business on a nonunion basis.

What good is a law designed to preserve retiree benefits that causes employees to lose their jobs?

The 1980 law is also destabilizing multiemployer plans and threatening retiree benefits because:

One, newly organized employers who have a choice in the matter will never voluntarily participate in such a plan.

Two, currently contributing employers will refuse to negotiate increase contributions, since they may only be negotiating a larger eventual withdrawal liability for themselves.

Three, employers even in well-funded multiemployer plans—which are reportedly 50 percent of the mulitemployer pension plans in the country—will terminate plan participation, just to avoid possible future withdrawal liability should their particular plan become underfunded in the future.

Four, employers contributing to multiemployer plans which are currently inadequately funded will terminate their plan participation now, and pay their assessed withdrawal liability, only to avoid a potentially larger withdrawal liability should they terminate plan participation sometime in the future.

Five, pension plan administration is injured by never ending litigation, employer discontent, additional administrative cost, and the like, all to plan's detriment.

My fundamental point is this: The 1980 law on paper may seem to stabilize plan funding and to insure retiree and employee rights, but in the real world it is having the opposite effect. The representatives from the Western Conference and Central States Teamster plans have already recognized this effect.

I would hope that this opposite, negative effect of the 1980 law would also be recognized by the supporters of the 1980 law as a basis for reform legislation, if not as sweeping as Senator Hatch's proposed amendment, at least some selective and consensus reform serving employer, union, and employee interests.

Simply put, the 1980 law may eventually hurt Mr. Georgine's constituency as much as it is now hurting the employer community, which means that reform legislation should be welcomed by all sides to the controversy.

Thank you.

Senator NICKLES. Thank you, gentlemen.

[The joint prepared statement of Mr. Cohn, Mr. Godsey, Mr. Mathews, Mr. Smith, and Mr. Zenor follows:]

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES HEARINGS ON SENATE BILL 1748, AMENDMENTS TO THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980

TESTIMONY OF PACIFIC NORTHWEST BUSINESS PANEL IN SUPPORT OF SENATE BILL 1748:

Richard E. Cohn
John A. Godsey, Jr.
John J. Mathews
Lester V. Smith, Jr.
John L. Zenor

March 17, 1982

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INTROUCTION

This booklet contains the testimony of several Pacific Northwest businessmen and attorneys who have traveled to Washington, D.C. to testify before the Senate Labor Committee on March 17, 1982, with respect to Senator Hatch's Bill to amend the Multiemployer Pension Plan Amendments Act of 1980 (MEPPA). We are testifying on this Bill because of our deep belief that MEPPA unfairly penalizes innocent unionized employers, and that the law is having a "reverse effect" of that initially envisioned by its sponsors. Essentially, instead of stabilizing the financial integrity of multiemployer pension plans, this law is destabilizing such plans, as well as destabilizing the business decisions and labor relations of the firms which have historically participated in such plans. This law is also contributing to the high unemployment in the country.

Members of the Pacific Northwest Business Panel presenting their views and testimony to the U.S. Senate on this important issue are as follows:

1. Richard E. Cohn: Mr. Cohn is one of the owners of CCM Enterprises, formerly known as Cohn Brothers Furniture in Portland, Oregon. Compelled by economic circumstances, this company recently sold its assets to another company, generating a probable "withdrawal liability" under MEPPA in excess of $150,000. Mr. Cohn testifies (page 4) as to the negative impact of this law on his relatively small retail business.

2. John A. Godsey, Jr.: Mr. Godsey is Corporate Personnel Director of Sierra Pacific Corporation, which operates ten lumber mills and related facilities in Northern California. On May 8, 1980, just days after the retroactive effective date of the new multiemployer law, the employees at one of the company's mills voted to decertify their union. This decertification vote -- which Sierra Pacific legally could not control -- has generated a probable withdrawal liability to Sierra Pacific of some $750,000. Mr. Godsey testifies (page 7) as to the unfairness of Congress' retroactive application of the law, and of the law's application in situations involving employee decertification of a union.

3. John J. Mathews: Mr. Mathews is owner and chief operating officer of OK Delivery Systems, Inc., a Portland, Oregon based trucking company. For some five years Mr. Mathews was a trustee on a multiemployer plan. Mr. Mathews testifies (page 12) that the pension plan funding problems addressed by this new law are really the creation

and responsibility of plan trustees who, helped by Congress, are now making contributing employers responsible for what they have done.

4. Lester V. Smith, Jr.: Mr. Smith is a partner in the law firm of Bullard, Korshoj, Smith & Jernstedt, specializing in the practice of labor law on the side of management. Mr. Smith details (page 16) several factual examples of the problems faced by clients of his firm under the new multiemployer law. He also offers several suggested improvements in the multiemployer law in specific areas, which would help to minimize its negative effect on employers, should Congress decide Senator Hatch's bill is not an appropriate reform.

5. John L. Zenor: Mr. Zenor is also a partner in the firm of Bullard, Korshoj, Smith & Jernstedt in Portland, Oregon. Mr. Zenor testifies (page 26) as to the "boomerang" effect of this new law, and specifically its negative impact on collective bargaining and on the ability of multiemployer pension plans to gain new contributing employers, or increased contribution levels. Mr. Zenor also testifies as to the negative effect this new law is having on the employment picture in the country.

Each of these witnesses is testifying not only on behalf of himself and his firm, but also on behalf of many other Pacific Northwest companies which are affected by the multiemployer law. Some of these companies are listed in the Appendix to this booklet.

The basic thrust of our testimony is that Congress should return the responsibility for any funding deficiency of a multiemployer pension plan where it belongs -- to the pension plan itself that created the deficiency -- and take this responsibility off the shoulders of contributing employers (at least absent a specific contractual agreement by that employer to provide or "guarantee" retirement benefits, as opposed merely to make contributions).

We hope our testimony will help to dispel several of the "myths" which have grown up with respect to this subject, including the following:

Myth No. 1: "Multiemployer plan underfunding is caused by employers who withdraw from participation, so they should pay their fair share of the underfunding when they withdraw." In truth, multiemployer plan funding deficiencies are not caused by withdrawing employers, but rather are caused by overgenerous retirement benefits set by the plan, by poor actuarial or investment decisions, and by questionable practice such as giving "past service credit" to employees newly entering the plan, without requiring any contributions for the years in question. (This is a "built-in" funding deficiency.) Employer withdrawal from a multiemployer pension plan is a legitimate, and statistically predictable, occurrence. Companies do not withdraw from plan participation because they desire to injure the plan, or to threaten employee retirement benefits, but rather for legitimate reasons, such as the death or retirement of the owner, the sale or termination of the business for economic reasons, or the fact that continued plan participation is no longer permitted because the union no longer represents employees of the company in question.

Myth No. 2: "All multiemployer pension plans have some funding deficiency and the multiemployer law thus benefits all such plans." Not all multiemployer plans have funding deficiencies. Many multiemployer plans, on both the national and regional level, have no unfunded vested liability. It is entirely possible to run a multiemployer pension plan in such a way that vested benefit obligations to employee-participants do not exceed plan assets. The multiemployer law "bails out," at employer expense, only those plans which have allowed a funding deficiency to exist, and the larger the deficiency the larger the "bail out." For example, the Western Conference of Teamsters Pension Plan and Trust reportedly has an unfunded vested liability of $1.5 billion, and the Central States Teamsters Pension Plan and Trust reportedly has an unfunded vested liability of some $4 billion. These are the only multiemployer plans which receive any "benefit" from the multiemployer law. The other, well-funded plans are not helped by this law, and indeed suffer from it, since employers may refuse to participate, or terminate current participation, in such well-funded plans just to avoid any future possible withdrawal liability under MEPPA.

Myth No. 3: "The multiemployer law stabilizes multiemployer pension plans in this country, and assures their financial integrity." In fact, the multiemployer law threatens the multiemployer pension plan system in this country, rather than stabilizing it. As the testimony of our panel demonstrates, the multiemployer law is causing companies making their initial choice to refuse categorically to participate in a multiemployer plan, thus drying up new sources of funding for that plan, and is also causing employers who now contribute to refuse to increase the amount of their contributions.

For all the reasons expressed in the testimony of our Panel, we strongly urge this Committee to support passage of Senator Hatch's Bill.

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STATEMENT OF RICHARD E. COHN
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
March 17, 1982

Senator Nickles, honorable members of this Subcommittee, my name is Richard E. Cohn. I am one of the owners of CCM Enterprises, formerly known as Cohn Bros. Furniture in Portland, Oregon. I want to thank you for giving me this opportunity to be here today. I hope that the testimony given during this hearing will show some of the problems that the Multiemployer Pension Plan Amendments Act of 1980 has created for relatively small family owned businesses across the country.

For three generations, my family has been in the furniture business in Portland, Oregon. My grandfather was an immigrant to this country and he and his brothers had a dream that in America they could start their own business and make a new life for their family. They started a secondhand store with two employees and within a few years their retail business grew and they opened a second location and hired more people. The brothers worked hard and helped bring that dream to fruition. After 83 years in business and under the guidance of my father, and his brothers, our furniture company became the largest retail furniture employer in Oregon, providing over 80 full time jobs.

The economics of the furniture business during the last ten years forced my family to consider closing our doors or selling our company. The high interest rates to finance our inventory and the drop off in home building hurt us greatly. Though we were losing money, we kept the business going and did not lay anyone off. Since 1953 some of our employees were represented by the Teamsters Union. The contract provided for negotiated contributions to a pension plan and we guaranteed to pay those contributions, but at no time guaranteed the solvency of the pension plan or the level of benefits determined by the Trustees of the plan. From 1975 to 1980 our Teamster employees' pension contributions rose from 45¢ an hour to 98¢ an hour. Throughout the years we enjoyed a good working relationship with the Teamsters Union. They did a fair job of representing the employees and we were always able to reach agreement without the necessity of a strike or arbitration. When the other furniture stores in Portland threw out the Teamsters, we refused to join them and look what it got us. Now we are left holding the bag. Is that fair? They are still in business, and no longer contributing to the Teamsters fund, while we have been forced out of business, and are now required either to continue paying into the fund, or face a huge liability.

We finally reached a point where we realized that we could no longer stay in business. We wanted to try to find a buyer for our firm who would continue to operate the store and provide a place to work for our employees. After months of negotiation with a family furniture company from Santa Barbara, we reached an informal agreement in late August of 1980 for the sale of our company. At that time there was no Multiemployer Pension Plan Amendments Act. One month after we signed the papers, we heard about this Act and learned that a large percentage of our life's savings would be wiped out. No one could understand how we could be penalized for something over which we had no control. It appeared that as much as 20% of the value of our company, the life's work of my grandfather, my father, and now myself, would be taken away. This sum represents the entire value of my ownership interest in the company. Is this possible under our Constitution that Congress can arbitrarily impose such a substantial financial penalty on our company by converting our property into the property of the pension plans, to correct problems within the plans which were out of our control? My grandfather would turn over in his grave if he could see what has happened to his dream.

I have always believed strongly in the American free enterprise system, but the experience of dealing with this pension law has really scared me and made me very distrustful. How can we be made a party to agreement between the pension plan and our employees, when our agreement was only with the union? I for one am never going to participate in a multiemployer pension plan again. If others feel the same way I do, I am afraid that this law will ultimately not accomplish what it was set out to do.

It is very easy to criticize, but simply because we may not solve the problem today, does not mean that we should not address the extreme unfairness of the application of this law. In every contract that we have signed, we operated under the assumption that we were fully purchasing benefits for our employees by our pension contributions. We were never made aware of any unfunded liability. It came as a total surprise to us. We have no idea how this liability is determined. Even today we don't understand how this unfunded liability could have been permitted to come about. I hope these hearings will create an awareness in Congress of the pain and suffering that this law is causing the small businessman. The improved future funding of pension plans and the heightened awareness of the unfunded liability problem will have a bearing on future collective bargaining agreements, but will be of no help to employers like ourselves who have been forced out of business. We urge you to amend the withdrawal liability law to limit its impact to those employers who have negotiated specific retirement benefits in a collective bargaining agreement, and to make this change retroactive to the initial passage of the law.

SIERRA PACIFIC INDUSTRIES
P. O. Drawer Y ARCATA, CALIFORNIA 95521

STATEMENT OF JOHN A. GODSEY
CORPORATE PERSONNEL DIRECTOR
SIERRA PACIFIC INDUSTRIES
SENATE LABOR COMMITTEE

My name is John A. Godsey, Jr.. I am the Corporate Personnel Director for Sierra Pacific Industries. As Sierra Pacific's Personnel Director, I am in charge of all of the Company's employee benefit plans as well as all personnel related activities. Our Company is a manufacturer of lumber and millwork products in Northern California. We employ over 1,500 employees at ten separate locations in small or medium sized communities.

Sierra Pacific is a family owned company which was founded by the father of our Company's president in 1950. During the thirty-two years since the founding of our Company it has grown from a tiny five man firm to a medium sized lumber and millwork producer. A large factor in our successful growth has been our ability to purchase the closed or closing operations of other firms, large and small, and then restore the operations to profitability. In each instance in which our Company made such a purchase, we would invest substantial amounts of money in purchasing new equipment and modernizing all production facilities.

Through this process we have also been successful in preserving and generating hundreds of new jobs in Northern California. The family owning Sierra Pacific has avoided taking any funds out of the Company, so it has been able to reinvest all after tax profits into improvements of manufacturing facilities and timberland purchases. During the four year period ending December 31, 1981, we invested tens of millions of dollars in modernizing our facilities and purchasing timberlands.

These investments have allowed us to compete successfully if not equally against our much larger competitors with their tremendous advantage of low cost logs harvested from immense timber holding.

Our employees have benefited greatly from our success as we have been able to provide them with wages and fringe benefits equaling or exceeding those provided by any other firm in our area and industry. Additionally, our employees were provided with more employment security as we have been able to run our operations and avoid substantial layoffs prior to 1981. Even during 1981, which was the worst lumber market in our history, we were able to operate more consistently and provide more employment than almost any of our competitors.

Today we are concerned with the tremendous and inequitable burdens placed upon us because of the effects of the Multiple Employer Pension Plan Act of 1980. In explaining how this unwarranted cost was imposed upon our firm it is necessary to delve briefly into the history of one of our operations which is located just north of Redding, California.

Sierra Pacific's Central Valley Division was purchased in 1971. At that time the Division's operations were broken up between two locations and consisted of extremely outdated and obsolescent equipment. Our Company began remodeling efforts at one location in 1972 and continued efforts through 1976 when a brand new sawmill and related facilities were built at the existing site. Since 1976 we have continued to expand and modernize the facilities; in fact we have just completed an eight month project aimed at expanding the quantity and diversity of our lumber production.

With these changes we have been able to maintain and even expand our labor force while our local competitors have reduced or closed their operations.

Our labor relations with our employees at this operation have always been excellent. When we purchased the operation in 1971 they were represented by the Lumber and Sawmill Worker's union and that representation continued without interruption and through May 8, 1980. The Lumber and Sawmill Workers representation also existed prior to our purchase and continued as far back as 1960.

From the time of our purchase in 1971 through May 1980, we were required by the terms of our contracts with the Lumber and Sawmill Worker's Union to make contributions on behalf of our employees to the Lumber Industry Pension Fund. Our predecessors also were required to make contributions to the Lumber Industry Pension Fund back to the start of the Fund's existance in 1961.

During this entire period we and our predecessors made all required payments on a timely basis and relied on the assurances of the trustees of the plan that the benefit levels that were adopted would be fully funded by our contributions. Under the terms of our agreement with the Plan and our union contracts, our obligations were specifically limited to making the required contributions. In our triennial negotiations with the Lumber and Sawmill Workers we were never able to bargain over the benefits of the Plan; that authority was exclusively reserved for the trustees.

While we did have the right to negotiate over the contribution rates, in practice our right was almost nonexistent as the plan would only agree to accept the contribution rate that had been negotiated between the largest employers and their respective unions in our industry. This state of affairs continued throughout the period of time our employees were represented by the Lumber and Sawmill Workers.

On March 31, 1980, we received a formal notification from the National Labor Relations board informing us that a petition signed by over 30% of our Redding Division's hourly employees had been filed with the Board on March 28, 1980 requesting an election to determine the representative status of the LSW as their bargaining representative. Under the terms of the NLRA employees are allowed to petition for such an election only during the 90 to 60 day period prior to the expiration of the existing contract. As our contract with the LSW had an anniversary date of June 1, 1980, the employees were only able to file a petition during the period of March 1, 1980 to March 31, 1980. It is normal NLRB procedure to schedule the requested election within the 30 day period after the filing of an employee petition. In this instance the NLRB election to determine the employees interest in continued representation by the Lumber and Sawmill Workers was not scheduled until May 8, 1980.

The election resulted in a slight majority of the employees voting to decertify the union as their bargaining representative. The election results were certified by the NLRB as of May 16, 1980 and Sierra Pacific lost its ability to contribute to the Lumber Industry Pension Fund as of the date of the election.

This exercise by our employees of their legally protected rights would not, in the normal course of events, have caused an injury to their employer. However, when later in September of 1980 Congress passed and President Carter signed the Multiple Employer Pension Amendments Act, we became liable for an enormous financial penalty. With its passage, the Act had the effect of forcing upon withdrawing employers tremendous and inequitable liabilities that they had never agreed to assume nor had any control of. The Act in addition was made retroactive back to April 28, 1980; some five months prior to its passage. This retroactive application of the law (which is by far not the normal procedure followed by Congress) included by a bare ten days the date of the NLRB supervised election at our plant.

If by some possiblity we had been able to forsee Congress's action in making the Act retroactive prior to the date of the election, we would still not have been able to eliminate our liability. Under the National Labor Relations Act, employers are forbidden from interfering in any fashion with employees' rights to organize or decertify a labor organization. Undoubtedly, we would have been guilty of a serious unfair labor practice if we had attempted to interfere with our employees' rights in order to minimize our potential liability.

If, however, the National Labor Relations Board had acted with more diligence and scheduled the election within the normal 30 day period after the petition filing (March 28, 1980), Sierra Pacific very possibly would not have become subject to any withdrawal liability as a result of its emplyees actions.

We believe it is outrageous and manifestly inequitable for our firm to retroactively become subject to enormous financial penalties when we were and are legally restrained from taking actions to minimize our liability. During the late summer of 1980, we conveyed our position and opinions to our representatives through industry associations, but we were unsuccessful in our efforts. We now stand liable to the Lumber Industry Pension Fund for a liability we did not create, control or negotiate over. The Act provides no assurance whatsoever that the liability will be determined in any manner other than arbitrarily and it specifically limits our rights to prompt judical review of the Funds actions.

Although the Funds provisions include clauses that reduce employees vested benefits in the event of their employers withdrawal, this reduction and other vested benefit reductions will not be taken into account in the determination of our liability. To date we have not received any communication from the Fund indicating the final amount of our liability or how they intend to calculate it. Our only idea of the size of our liability comes from a letter that was sent by the administrator of the Fund to a representative of the decertified union in April of 1981. The letter indicated that our potential liability on account of our withdrawal from participation was $748,000. Apparently this information was to be used by the Union in its attempt to re-organize our employees in 1981.

We were naturally surprised by this information as we understood that the MEPPA required all Plans to adopt procedures for calculating the withdrawal liability and these procedures had not been adopted by the Plan as of the date of the letter.

We have attempted throughout this process to minimize any negative effects on our employees by immediately covering them under our own defined contribution plan as soon as they were no longer eligible for coverage under the Lumber Industry Pension Plan. All employees were given credit for the years of service back to their original date of hire in determining their allocations under our plan.

Our plan provides for an hourly contribution rate equal to that provided under the Lumber Industry Plan and in addition requires contributions by Sierra Pacific for all hours worked rather than just an assumed 40 hours per week. With the much more rapid vesting of our plan compared to the Lumber Industry Plan, our employees have received higher contributions together with a much higher liklihood of receiving all or a substantial protion of their promised retirement benefits.

In summary, we believe that in our case the Multiple Employer Pension Plan Act of 1980 has had the effect of retroactively imposing an enormous and inequitable penalty upon our firm because of our employees exercise of their legally guaranteed rights. If we are forced to pay this outrageous penalty to the Lumber Industry Pension Fund, we have absolutely no assurance that the funds will be used to assure the withdrawing employees retirement benefits; nor do we have any assurances that these funds will be used to guarantee the vested benefits of another 250 employees we have which are still covered by this plan.

The only assurance that we have is that this unwarranted penalty will further increase our operating costs at a time when we are experiencing and expecting continuing losses due to the poor lumber market. Such increases in costs without any resulting benefits to our employees or our company can only reduce our employees security in future employment.

STATEMENT OF JOHN J. MATHEWS
BEFORE U.S. SENATE LABOR & HUMAN RESOURCES COMMITTEE
MARCH 17, 1982

Mr. Chairman and Senators, I'm John J. Mathews, President of OK Delivery System, Inc., a family-owned trucking, warehousing, and freight distribution firm headquartered in Portland, Oregon. We employ about 75 full-time workers, most of whom are members of the International Brotherhood of Teamsters. With the exception of certain office workers, all of our Teamsters are covered by the Western Conference of Teamsters Pension Plan.

For the 32 years that our family has owned the business, we have made monthly contributions to the Western Conference Pension Plan on every covered employee in amounts specified by terms of labor agreements negotiated at three-year intervals between the company and the union---always at increasingly higher levels. (In fact, our pension contribution per hour today approximates the total union hourly wage when we bought the business in 1950.)

We are not now in arrears in our contributions, and we have never committed an act of default. But the 1974 ERISA law and the 1980 Multiemployer Pension Amendments Act have been used as weapons to extort money from us and to threaten us against allowing our Teamster employment to decrease. These blackmail tactics have been directed against us and countless other truckers to enable our pension trustees to continue dissipating the funds in their care.

In the particular pension plan covering our company, this dissipation takes the form of a seemingly innocuous practice, i.e., granting what are called "prior service credits" to employees who newly join the program. Under this scheme, a worker who has spent his previous working life outside the pension plan's coverage is treated as though contributions have been made on his behalf---when, in fact, they have not.

Can you imagine going to New York Life or Northwestern Mutual, and suggesting that you'd buy an annuity if they would just pretend that you had already been paying the premiums for the past 10 years? And yet this is exactly what's happening in the Western Conference of Teamsters Pension Plan.

> It's an organizing gimmick. It costs the union nothing. And, thanks to ERISA and MEPPAA, it now costs the trustees nothing. My company (and others like it) are simply forced to pick up the tab for the giveaway.
>
> This tab isn't light. In the aftermath of 1974's ERISA we got hit for what was called the "7¢ nickel." That's a euphemism for a 40% increase in contribution without one iota of improvement in entitlements to the retirees! It was levied by the Pension Plan trustees without any right of appeal or any opportunity for negotiation by the contributing employers.

Then, in 1981, the same trustees issued a new ultimatum setting forth a list of conditions which they would construe as acts of withdrawal by contributing employers, even though those employers had met every pension obligation under their labor contracts. Using as their weapon the Multiemployer Pension Plan Amendments Act of 1980, the Western Conference of Teamsters trustees notified us that they would seize the assets of companies like mine:

---If a fire or flood forced us to cease or curtail operations;

---If our employees voted to leave the union; or

---If economic conditions reduced the number of our employees.

Now, even laymen like me sense that such threats fly in the face of Constitutional guarantees of due process, but while challenges based on these and other grounds are fought, ditch by ditch, through the Federal court system---a process expected to consume years---my company and others who share its plight find themselves in mortal jeopardy. Moreover, bad news travels fast. Lenders are taking a harder look at borrowers who live in the shadow of this guillotine. Potential buyers have all but fled the scene.

What needs to be emphasized is that the Pension trustees, armed with the 1980 Act, have risen from callousness to arrogance. They refuse to answer inquiries by those of us who have contributed to the Fund. They continue to grant prior service credits to employees for periods in which no pension contribution was being made. And they are now expanding their domain by annexing yet another pension trust that is in serious trouble, even though that annexation will further dissipate the corpus of the Western Conference trust, and will knowingly increase the vested unfunded liability of the trust by $50 million!

> My point is that the bill you have under consideration does not favor management over labor. The issue is not a quarrel between employer and employee. We're in the same boat. The villains of this piece are the trustees in plan after plan who are plundering or dissipating the vast sums they control.
>
> It is to put a stop to this piracy that I am here to urge this Committee to approve the bill before it.

Gentlemen, from my perspective, the evidence is ineluctable that pension plan trustees across the country are snickering at MEPPA as an endless stack of blank checks drawn against the very employers who have supplied them their funds. I submit that the Hatch Bill affords a simple, straightforward, and direct means of wiping the smile off their faces---of signalling that Congress intends the multi-employer pension plans of this nation to be administered fairly and responsibily, and not as rackets for the enrichment and amusement of the trustees.

Thank you.

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STATEMENT OF LESTER V. SMITH, JR.
SENATE SUBCOMMITTEE ON LABOR AND HUMAN RESOURCES
March 17, 1982

I. Background

My name is Lester V. Smith, Jr. I am a partner in the law firm of Bullard, Korshoj, Smith & Jernstedt, P.C. of Portland, Oregon. I have been practicing labor law for 17 years. Part of that time was spent as a trial attorney with the NLRB and as an instructor of labor law for the University of Maryland.

Our firm specializes in the practice of labor law on the side of management. Among other things, work for our clients includes the negotiating of collective bargaining agreements and the advising of clients on the labor law implications of the various pension laws. I am testifying today not only as an individual practitioner with experience in labor law but also on behalf of some of our clients, including those listed in the Appendix to this booklet.

II. The General Problems with MEPPAA

In conjunction with the views expressed by other members of our panel, I would like to emphasize some of the actual problems or situations which have been encountered by clients of our firm. All of these problems have occurred since the date that the Multiemployer Pension Plan Amendments Act of 1980 went into effect. The point of my testimony is that the new law has not served as a basis for encouraging employers to become part of multiemployer pension programs or to remain part of a multiemployer pension plan. It has caused numerous problems. As my partner John Zenor has expressed, the reaction to the law by all of our clients has been universally negative.

The negative attitude of our clients to MEPPAA comes from the fact that the law now imposes requirements never foreseen by employers, who in good faith entered into collective bargaining agreements with unions which included a multiemployer pension plan. Frustration with MEPPAA by our clients also grows out of the practical effect of the law which inhibits normal capital transactions. Clients also have found that the law has the effect of lowering the number of job opportunities which are now available or could be available in the market place.

III. Situations Reflecting the Problems with the MEPPAA

Allow me to provide you with a number of real examples which I believe illustrate the frustrations of our clients. In order to protect the ongoing relationship of the employer and the labor organization involved and the attorney-client privilege, I will not set forth the names of the parties. However, each situation is factual.

Situation 1: Client A is a firm with both a manufacturing and a retail sales division. In order to combat the diminished sales caused by the slumping state of the economy, the company has aggressively increased its efforts in retail sales. It has moved in this direction in an effort to avoid the "middle man" previously used to move its products. Coupled with the retail sales effort, the company has also been actively looking to diversify its operations and to sell off portions of its manufacturing operations which are no longer needed and are unprofitable. The company currently has a work force of approximately 65 employees and at one point employed approximately 95 employees. Of that latter number, approximately 75 had been covered by a collective bargaining agreement. That number has now been reduced to approximately 32. The multiemployer pension plan to which the company is subject by virtue of its collective bargaining agreement currently has an estimated "unfunded vested liability" of approximately $7,000 per employee.

At the present time the company is greatly concerned because of the potential that its work force may drop to a level which will trigger "partial withdrawal liability" under MEPPAA. Of more immediate concern is the company's interest in selling off one portion or section of its manufacturing operations, which if sold would likely trigger a different category of partial withdrawal liability. Despite the attractive nature of this manufacturing section, and the ease with which it could be converted or integrated by a buyer to other fields of production or manufacturing, the company has not been able to consummate a sale. The primary obstacle has been the fact that no potential buyer wishes to assume the pension requirements under the collective bargaining agreement covering the manufacturing employees.

It should also be noted that the company has been exploring the option of buying portions of related enterprises which would dovetail with its other operations.

Purchase of such a unit or units would eliminate the unprofitability caused by the manufacturing section. If the employer were able to acquire new facilities, it would create job opportunities doubling the past high level of employment of the company. It is anticipated the new employees would fall under the existing bargaining agreement. However, realizing these employees might only increase the employer's future "withdrawal liability," the employer is now reluctant to move forward. Instead, the employer is contemplating scaling his business down to a level that will not trigger liability under MEPPA - a business decision dictated entirely by MEPPAA, and contrary to what the employer would otherwise do.

Situation 2: Client B owns two independent companies which are basically in the same business. One company has employees covered by a collective bargaining agreement which includes participation in a multiemployer pension. The second company has a union contract but that agreement does not tie the employer to a multiemployer pension plan. Employees at both companies are represented by the same union.

As noted, the two firms are wholly independent of each other for labor relations purposes. Among other things, they have different customers and have separate supervision, equipment, employees, and facilities. Due to the economic conditions of the last two years, the first firm, the one participating in the multiemployer pension program, has experienced financial difficulties. These difficulties have caused a decline in the number of employees. In fact, the decline in employees has fallen dangerously near to the level which will trigger partial withdrawal liability. Based on projections through the end of calendar 1982, it is not advisable to continue with this operation. Under the circumstances, it would be wise for the client to merge its two operations, or to sell off the unprofitable one. However, as it now stands, it is not feasible to merge the two companies. If the multiemployer pension plan participation survives a merger, and applies to all employees, the company will have increased its potential withdrawal liability; if it doesn't survive the merger, the company will have triggered its actual withdrawal liability. Thus, the client is faced with not being able to sell or to merge an unprofitable company because of potential withdrawal liability. Of course, nearly 30 employees are in a position whereby they may lose their jobs unless a solution can be found.

Situation 3: Client C recently purchased a firm which was in financial difficulty. The employer assumed a collective bargaining agreement signed by the prior company which included a multiemployer pension program. The client also hired 90 percent of the employees who worked for the seller. Through the process of reorganization, updating of equipment, and better operating procedures, the client has been able to turn the operation into a profitable business. Within eight months of the purchase, and subsequent to the reorganization efforts, the employees of the company filed a decertification petition with the National Labor Relations Board. Shortly after the petition was filed, the union "walked away," disclaiming any interest in continuing to represent the employees. The disclaimer brought on a claim for withdrawal liability from the multiemployer plan.

It should be noted that since the purchase of the company the client has greatly expanded its work force. In fact, the client is now aggressively pursuing opportunities in neighboring cities as well as in Portland to acquire or merge with businesses of a similar nature. During the last three months the company has gone into negotiations with three such firms. In each situation, negotiations for the takeover of the business have terminated for the reason that each potential seller has a collective bargaining agreement with the Teamsters which includes a multiemployer pension plan.

Based on the client's prior experience with his own union, and the withdrawal liability thereafter imposed, the client wishes to have nothing further to do with the potential liabilities imposed by the Multiemployer Pension Act if it acquires another business. Each potential seller is likewise aware of the risk of withdrawal liability it takes with a sale, and has adjusted the sales price of its company accordingly. Thus, all potential sales have fallen through. Each of the potential sellers is currently economically strapped. If they do not sell their firms, or if the economy does not improve, they are likely to go out of business thereby causing not only the loss of jobs but also the triggering of withdrawal liability.

Situation 4: Client D has been party to a series of collective bargaining agreements negotiated while the company was a member of a multiemployer bargaining association. Until recently the firm was involved in a construction related business. For economic reasons in 1979 the firm changed product lines. In early 1930 the company decided to withdraw from the employers association in order to bargain for terms in its next collective bargaining agreement which would better fit the type of business into which the company had evolved. In 1981 the union reopened the contract, but before bargaining with the client completed negotiations with the employers association.

Following the signing of the contract with the employers association, the union and the company got together to begin negotiations. The union submitted a proposal to the company which was in all ways identical to the association agreement. The company countered with nearly the same economic terms but different language needed to fit the changed operations of the company. When the union's business representative was confronted with the fact the employer would not sign the association's agreement on a "me too" basis, he made it clear that the union could not agree to a different contract for the company from those which were signed by all other employers in the area.

Several negotiation sessions were held with representatives of the union. Throughout the course of the discussions the union continued to hammer on the point that they could not cut a different deal with the company and had no obligation under the law to change from the pattern that had been negotiated with all other employers. At the third session one of the business agents made the statement that "the employer was playing with fire," because if he didn't sign the contract the company would not only be faced with a strike, but withdrawal liability would be triggered under MEPPAA.

It should be noted that the real issue of negotiations did not focus on wages or on other basic fringe benefits, but instead focused on work rules and other provisions which the union insisted must remain in the contract notwithstanding the changed nature of the employer's operation.

The employer has now gone through the process of using the Federal Mediation and Conciliation Service and has continued to press its case regarding the issue of the need for a contract to fit its operations. The parties are now at impasse and the employer plans to implement the terms of its proposal to the union. As you might guess, the union has notified the plan trustees to pursue the employer for withdrawal liability.

It should be noted that in off-the-record discussions with the union representatives, they are most apologetic for having to insist on the hard union line of not providing the employer with any relief from the "industry" agreement. In fact, one business agent has candidly admitted that he has used the hammer of the withdrawal liability in our client's case to help emphasize the point that other employers should not try to take on the union by getting out of the employer association. He further states that it is the intention of the union to continue to use the withdrawal liability threat to get their point across.

Situation 5: A rather unique situation, with which we are indirectly involved, has come to the attention of this firm. An employer in the warehouse and shipping business is dependent upon periodic contracts from other suppliers and shippers. The employer must bid on contracts which then sustain business for the next one to three years. The employer has a contract which includes a multiemployer pension article.

Recently this employer has become greatly concerned with the prospects of triggering withdrawal liability if it should lose one or two of these supply agreements. The strong possibility exists that the employer within the next year will lose several major contracts as a result of current economic conditions. If this occurs, partial withdrawal liability will occur. Moreover, there is a strong possibility he will not regain other business to take the place of these contracts.

Although the employer understands the realities of current market conditions, it is greatly concerned with the future prospects for his business and the high potential of triggering withdrawal liability in circumstances beyond his control. As a result, he is seriously considering the sale of his business. Of course, he recognizes that a sale again presents him with the potential for a withdrawal liability assessment. Obviously, this potential will greatly detract from the sales price of his business. In the alternative, if he tries to pass the cost of the liability on through the sale, his selling price is likely to defeat the possibilities of actually finding a purchaser, particularly in face of the current market. Notwithstanding this no-win situation, the employer believes it may be better to get out of the business now while his withdrawal liability is lower than it may be in the future.

Situation 6: There is another dilemma which has faced three of our clients as a result of MEPPAA. These situations involve a "twist" of the usual course of events between an employer and a labor organization. In each situation the client is party to a contract with a multiemployer pension program, and has been confronted with "objective considerations" that his employees no longer wish to be represented by their union. In one of these settings the employer has come to our office with a petition signed by employees which has been delivered to management. The petition states the employer should not bargain with the union even though the collective bargaining agreement has been reopened by the labor organization.

In each of these situations the union involved has fallen on "hard times." The local union's leadership is in a state of disarray, and the local union has been placed in trusteeship by its International. Indeed, it is the union's status which has caused the employees to be dissatisfied. Unfortunately, in each of the three situations if the union is decertified or if the union disclaims interest in being the bargaining representative, this will trigger a substantial withdrawal liability. In one situation the withdrawal liability will far exceed the assets of the company.

Under the above circumstances, what should the employers do? In theory if an employer campaigns for the union, that action could amount to an unfair labor practice under the National Labor Relations Act. If an employer says nothing and allows events to take their course, he may be stuck with a withdrawal liability which will put him out of business. As in Situation 5, it may be wise for one of the employers to take the withdrawal liability now, while the unfunded vested liability is likely to be lower than if the same situation occurs after another three-year collective bargaining agreement.

I suggest these employers are in an impossible dilemma. I might note that in two of the situations the union is likely to be voted out. In the third situation the union has stated it will disclaim interest in representing the employees. I might note also that this particular labor organization was the same one cited in Situation 4. The union business agent has told the employer the union will have the last laugh despite the disclaimer because of the withdrawal liability.

Situation 7: This is another situation which has frightening possibilities. Client F is party to a multiemployer bargaining association which has an agreement for its members that includes a multiemployer pension program. The pension trust is a small one, and has been faced with economic problems for a number of years. In fact, it is believed the trust may be faced with termination if more than two of the employers withdraw. Again, the employer is considering bargaining out of the trust now, rather than waiting until a later date, in order to limit the amount of its withdrawal liability, yet this act may help to signal the demise of the entire pension trust.

IV. Possible Alternatives to S. 1748

The situation is severe. Employers are now faced with potential liability, and as a result have no interest in continuing in, or becoming a part of, a multiemployer pension program. Indeed, many are losing incentives to continue with their business. Because of MEPPAA employers are unable to enter into normal capital transactions that lead to the betterment of a business, the start of a new business, or the saving of an old business. In each situation this failure of capital transactions causes the unnecessary loss of jobs.

Although I strongly endorse Senate Bill 1748, I recognize that it represents a form of legislative repeal of a piece of legislation that involved several years of study to enact. Of course, the length of the legislation or its period of consideration does not make it a good law. In this case the practical application of the measure is having devastating effects on employers of all sizes and types. In light of the problems with MEPPAA, I offer the following additional suggestions to help correct its inequities, should S.B. 1748 appear too harsh to some:

1. Amend MEPPAA to allow an employer to avoid withdrawal liability by continuing at his option to participate in the pension program absent a collective bargaining relationship or a labor contract. Allow participation at the contribution rates to which the employer was subject at the time of the withdrawal. Amending MEPPAA in this fashion would allow some employers to stay in business, and would allow employees to continue to remain in the pension program, notwithstanding a lack of union representation or of a labor agreement, and provide a continuing source of funding for the plan in question.

2. Amend MEPPAA to exclude from the calculation of withdrawal liability amounts credited by the trust for prior service credits. A good portion of some trust's funding deficiencies derives from their practice of giving employees "credit" for benefit purposes for years worked prior to their coverage under the plan. An employer should never be held accountable for such funding deficiencies.

3. Amend MEPPAA to require trustees to compute an employer's withdrawal liability on the basis of a fixed percentage of the net worth of the employer. This is similar to the procedures under the prior law, under which an employer could not be held accountable for more than 30% of its net worth in a withdrawal liability situation.

4. Amend MEPPAA to establish a "cap" on the withdrawal liability. For example, limit the total exposure of an employer to the amount of his last two years of contributions to the fund.

5. Amend the MEPPAA by raising the level of the "de minimis" exemption now set forth in the current statute. An increase in the de minimis level would allow a lot of smaller employers to stay in business or transfer their assets to other job-creating businesses. There should be a "de minimis" exemption applicable to all withdrawals of at least $150,000, as opposed to the current $50,000 exemption applicable in most cases.

6. Amend MEPPAA to require trustees to undertake and provide employers with full notice of all actions the trust plans to take affecting unfunded vested liability, and an advance opportunity to be heard. The classic example of where employers were kept in the dark is the action by the Western Conference of Teamsters in merging with the pension of Teamsters Local 85. This action created an increase in the Western Conference's unfunded liability for employers of approximately three percent, and was accomplished without the slightest "by your leave" from the trust to the employers.

7. Amend MEPPAA to require the interest rates assumptions of the trust to be more realistic. Now many trusts establish a six to seven percent investment return "assumption" on the funds held by the trust. This causes an "artificial," or "paper," unfunded vested liability which employers must pay. A more equitable procedure would be a calculation based on the adjusted prime rate for interest.

8. Amend MEPPAA to allow a more workable format for employers to challenge the action of trustees. Allow employers to challenge the actuarial methods utilized by the trust and allow employers to question the computations that give rise to large unfunded liabilities. Current law gives employers few rights in this regard.

9. Amend MEPPAA by requiring an increase in the insurance premium rates charged by the PBGC. The current ceiling for contributions per participant per year is pegged at $2.65. An actuarial review of the expected failings for trusts should be utilized to help determine a more realistic premium rate, and these premiums - not employer liability - can help "insure" plan solvency.

10. Amend MEPPAA to provide an exception to the employer faced with liability as a result of a decertification or disclaimer of interest by a union. Where the union has lost its majority status, withdrawal liability should not be imposed. The triggering event is entirely beyond the employer's control.

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STATEMENT OF JOHN L. ZENOR
SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
March 17, 1982

Gentlemen of the Committee, my name is John L. Zenor. I am a partner in the law firm of Bullard, Korshoj, Smith & Jernstedt, Portland, Oregon, specializing in the practice of labor law on the side of management.

You have heard many other witnesses talk about the unfairness of the new multiemployer law. I am not going to dwell on that subject today, except to say that in my practice I am in a position to see the reaction to this law on a wide industrial front, since I represent clients in trucking, health care, food processing, agriculture, wood processing and lumber, hotel and restaurant service, and many other industries. These companies uniformally have played no role whatsoever in the decisions which have led to a funding deficiency in a particular multiemployer pension trust, yet are now required by Congress to assume responsibility for such funding deficiencies, despite the fact that they have completely satisfied all pension contribution obligations under their collective bargaining agreements. You can well imagine the shock, dismay, and anger which unionized business feels toward this new law.

My partners and I together have well over 75 years in the specialized practice of labor law on the side of management, and none of us has seen a reaction to any federal or state legislation similar to the one the new multiemployer law has generated. Simply put, our clients are outraged, and the repeal or modification of the law has become a number one priority with many of them.

Rather than focus on the manifest unfairness of the law, however, I believe it would be productive instead to focus on some very specific issues -- the negative impact of this law on collective bargaining and labor relations in general; on the ability of pension plans to cure their present funding deficiencies; and on the country's overall employment picture.

I. NEGATIVE IMPACT ON COLLECTIVE BARGAINING & PLAN FUNDING

There are several ways in which the new multiemployer law adversely affects collective bargaining, and indeed may lead to greater underfunding of multiemployer pension plans.

First, any unionized employer which has not historically participated in a multiemployer plan, such as an employer whose employees only recently voted for union representation, would have to have lost his senses to agree to participate in such a plan in the future. Such participation would be needless exposure to potential withdrawal liability. I advise my clients in such a position that they should not even consider participation in a multiemployer plan because of the new federal law, even if the particular plan in question is currently well funded. I believe it might be professional malpractice to advise a client any other way.

Indeed, in two sets of labor negotiations I have handled, my clients have agreed to pay the equivalent pension contribution rate requested by a union to an IRA account for employees, rather than to a multiemployer pension plan, simply to avoid any potential withdrawal liability in the future. My clients were perfectly happy to participate in the multiemployer plan but for potential withdrawal liability. In both of these cases, strikes were narrowly averted by our proposal to funnel the money into an IRA.

Thus, the new law is greatly complicating collective bargaining, since newly organized employers have no choice but to refuse union demands to participate in a multiemployer plan, even if the contribution rate is not at issue. The law is thus having a negative effect on plan funding directly opposite of that intended by its drafters, since it is "drying up" new sources of revenue for a pension plan because no new employers will voluntarily participate.

Secondly, many of my unionized clients plan to "get out while the getting is good" from their particular multiemployer plan, during their next collective bargaining negotiations. These are clients who currently contribute to an adequately funded multiemployer pension plan, so that they currently face no potential withdrawal liability, but who are concerned that the plan may become underfunded in the future. These are also clients who participate in an underfunded plan at the present time, but who compute that their withdrawal liability will be a relatively small amount if they cease participation soon. Thus, even existing sources of plan funding, let alone the new sources of funding, for multiemployer plans will be drying up in the future as these sorts of employers terminate plan participation. The well-funded pension plans which do not currently have a problem are the ones that may be most likely to be hit by massive employer withdrawal.

Of course, such employer terminations of plan participation may also leave some employees on whom contributions have been made "high and dry," without any retirement benefit, because their employer will have ceased participation before they have become "vested" in their benefits. Needless to say, a collective bargaining relationship also becomes very strained if an employer is economically compelled to terminate pension plan participation with such adverse consequences to employees.

Third, even currently contributing employers who decide to stay with a multiemployer plan (most likely because they cannot afford to withdraw) are going to resist any union attempts to negotiate an increase in their contribution rates, since the greater their level of participation in a particular plan, the higher the potential withdrawal liability. This adamant employer position will also lead to collective bargaining tension and decreasing revenues for the multiemployer pension plans.

Finally, and perhaps most importantly, several of the events which can trigger an employer's withdrawal liability are directly related to the collective bargaining relationship between a company and a union, and are either in the employees' or the union's control. For example, each of the following will terminate a company's ability to continue to participate in a multiemployer pension plan:

1. Decertification of the union at a particular company (by virtue of a majority of the employees voting against the union in a National Labor Relations Board election);

2. A selection by employees of a different union to represent them (again in an NLRB conducted election); and

3. An extended collective bargaining impasse between the company and the union culminating with the union's "disclaiming interest" in representing employees in the bargaining unit.

Under federal labor laws, an employer may not lawfully interfere with employees' free choice in a decertification election, or in whether or not to retain a particular union as their representative, yet under federal pension laws such an employer literally may not be able to "afford" an employee vote against an incumbent union. The new multiemployer law virtually requires many employers to join hands with their current union to strongly urge employees not to vote against that union. The new multiemployer law thus erodes employee rights under federal law, since by changing unions or going nonunion they may only be guaranteeing the insolvency of their own company, and putting themselves out of work. Indeed, there is nothing more ironic than an employer being legally powerless to stop employees from decertifying a union, yet giving them their "pink slips" the next day because he cannot afford to stay in business because of withdrawal liability.

The situation is even worse with respect to a union's "disclaiming interest" in representing a particular unit, regardless whether the union does so for internal union reasons or because of an extended bargaining impasse with the employer. Here the ability to impose withdrawal liability upon an employer is solely and completely within the union's control. Some unions already have begun to threaten in collective bargaining that any extended bargaining impasse may lead to a union disclaimer of interest and consequently to an employer withdrawal liability, and to use such threat as a "Sword of Damocles" hanging over the employer's head, and as a way of getting employers to agree to whatever bargaining demands the union is making.

The ability of either unions or employees to trigger employer withdrawal liability on their own, without any employer action, is one of the worst features of the new law, and has an extremely negative impact on the collective bargaining relationship.

II. NEGATIVE IMPACT ON EMPLOYMENT

The multiemployer pension amendments also have a direct negative impact on the employment picture in this country. Withdrawal liability, since it is a function of the enormous funding deficiencies of some pension plans, often exceeds a company's net worth, so that an employer served with a withdrawal liability "bill" simply cannot stay in business. The law which was designed to protect the retirement benefits of employees may have the primary effect of taking away their job benefits, because their employer simply cannot survive when assessed a withdrawal liability.

In many other pernicious ways the new law also affects the country's employment picture. For example, a unionized employer may find it impossible to get a loan from a bank or a commerical lender to keep his business going, or to sell his company to someone who is willing to infuse new venture capital into it, because of the looming contingent withdrawal liability the company faces. Without such new capital the company may be forced into insolvency or bankruptcy, with the consequent loss of jobs to its employees.

One company I represent was in severe financial difficulty, and was approached by three companies on a proposed purchase. Each one of these three prospective buyers quickly agreed to a price, and was more than willing to take over the company and to keep all employees working. However, each one of these three companies backed off as soon as it discovered the potential withdrawal liability under this new law that it might "inherit" if it bought this company.

In addition, under some provisions of the law, dealing with construction industry employers and with partial withdrawal liability, an employer can escape withdrawal liability by going out of business entirely at a particular lcoation or in a particular geographical area, rather than continuing in business without also continuing to participate in a multiemployer plan. The new law thus gives an incentive to an employer in these situations to avoid withdrawal liability by terminating all employees of a particular operation and going out of business entirely, once he is no longer able to participate in a multiemployer pension plan at that location, rather can continue to provide jobs for covered employees at the facility.

In all of these ways, this new law is hurting the collective bargaining picture, the employment picture, and the pension funding picture in this country. Rather than solving problems, it has created a pandora's box of new problems which Congress must address. The "cost" of the new multiemployer law is simply too high, especially when analyzed in the light of the unfairness of its basic premise, that employers should be required to "bail out" underfunded pension trusts when they had nothing to do with creating the funding deficiencies. This law is not stabilizing multiemployer pension plans as its drafters intended, but it is destabilizing them. For these reasons, I and my clients strongly support Senator Hatch's Amendment which would exempt employers from the new law who have only bargained contribution rates, and not expressly agreed to guarantee retirement benefits.

APPENDIX

PACIFIC NORTHWEST COMPANIES SUPPORTING AMENDMENT ON REPEAL OF MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT OF 1980

I. OREGON DRAYMEN AND WAREHOUSEMEN'S ASSOCIATION

Admiral Moving & Storage, Inc.
Portland, OR
Albina Transfer, Inc.
Portland, OR
Bekins Moving & Storage Co.
Portland, OR
Bend Storage & Transfer, Inc.
Bend, OR
Bertsch Moving & Storage, Inc.
Eugene, OR
Blue Bird Transfer, Inc.
Vancouver, WA
Bower Transportation Services, Inc.
Tigard, OR
Capital City Transfer Co.
Salem, OR
Chappell's Trucking Co.
Portland, OR
City Moving Systems, Inc.
Corvallis, OR
City Transfer & Storage Co.
Astoria, OR
Connies, Inc.
La Grande, OR
Consolidated Freightways, Inc.
Portland, OR
Coos Bay Transfer
Coos Bay, OR
Corvallis Moving & Storage Co.
Corvallis, OR
Cummings Transfer Co.
Albany, OR
East Side Van & Storage Co.
Portland, OR
Eugene Moving & Storage Co.
Eugene, OR
Flegel Transfer & Storage
Roseburg, OR
Forwarders Service Co.
Portland, OR
Franklin's Moving & Storage
Grants Pass, OR
Fulton Moving & Storage Inc.
Portland, OR
Fulton Oregon Air, Inc.
Portland, OR
Green Transfer & Storage Co.
Portland, OR
Harbor Moving & Storage
Brookings, OR
Holman Transfer Co.
Portland, OR
Industrial Craters & Packers
Portland, OR
Interstate Heavy Hauling, Inc.
Portland, OR
Irvington Transfer & Storage
Portland, OR
Jamico, Inc.
Portland, OR
Kelly Transfer
Bend, OR
King Moving & Storage Co.
Cornelius, OR
Klamath Moving & Storage Co.
Klamath Falls, OR

Lane County Moving & Storage
Eugene, OR
Larsen Transfer Co.
Pendleton, OR
L.C. Halls Truck Line, Inc.
St. Helens, OR
Leavitt's Freight Service
Springfield, OR
Lester Moving & Storage
Hood River, OR
Lile International
Portland, OR
Maddox Transfer Co.
Portland, OR
Mark VII Delivery Service
Portland, OR
Medford Moving & Storage Co.
Medford, OR
Medford Package Delivery, Inc.
Medford, OR
Merchants Riverview Delivery
Portland, OR
Metropolitan Trucking, Inc.
Portland, OR
Mitchell Bros. Truck Line
Portland, OR
Moe's Pianos, Inc.
Portland, OR
Mullen Moving & Storage
Portland, OR
Rex Myers Transfer
Springfield, OR
McBreen Trucking, Inc.
Portland, OR
McCracken Motor Freight
Eugene, OR
McMinnville City Transfer
McMinnville, OR
National Motor Freight, Inc
Seattle, WA
Nix Transportation, Inc.
Albany, OR
Nottingham's Transfer Co.
Portland, OR
O K Delivery Systems, Inc.
Portland, OR
Jay F. Oldham & Son, Inc.
Eugene, OR
O'Neill Transfer Co., Inc.
Portland, OR
Oregon Transfer Co.
Portland, OR
Oregon-Washington Transport
Portland, OR
People's Warehouse, Inc.
Klamath Falls, OR
Pihl Transfer & Storage Co.
Portland, OR
Porter Truck Line
McMinnville, OR
Portland Auto Delivery, Inc
Portland, OR
Portland Freight Service
Portland, OR
Priestley & Sons Moving
Portland, OR

Progressive Transfer Co.
Portland, OR
Quality Moving & Storage Co.
Tigard, OR
Ralph's Transfer & Storage,
The Dalles, OR
Rapid Transfer & Storage Co.
Portland, OR
Reddaway's Truck Line, Inc.
Portland, OR
Reliable Transfer Co.
Portland, OR
Rose City Moving & Storage
Portland, OR
Sanddy Transfer Co., Inc.
Portland, OR
Sherman Bros. Inc.
Eugene, OR

Smith Bros. Moving Service
Baker, OR
Southern Oregon Transfer
Grants Pass, OR
Stroud Moving Co., Inc.
Portland, OR
Superior Cartage, Inc.
Portland, OR
Swartz Moving & Storage Co.
Portland, OR
Terminal Transfer, Inc.
Portland, OR
Town Delivery
Portland, OR
Truckways, Inc.
Portland, OR

U.S. Transfer Co.
Coos Bay, OR
Valley Freight, Inc.
Eugene, OR
Valley Storage
Corvallis, OR
West Side Mayflower
Tigard, OR
Rudie Wilhelm Warehouse Co.
Portland, OR
Wilhelm Trucking Co.
Portland, OR
Williams Transfer Co.
Eugene, OR
Wilson Moving & Storage Co.
Bend, OR
Wymore Transfer Co.
Oregon City, OR

II. LOCAL AND SHORT HAUL CARRIERS NW CONFERENCE, OREGON TRUCKING ASSOCIATIONS, INC.

Bower Transportation Services
P.O. Box 609
Vancouver, Washington 98666
Marvin Coulet 228-7311

Columbia River Truck Co.
P. O. Box 1001
Camas, Washington 98607
Glenn Blake 289-1107

Barny Truck Line
841 - Third Ave.
Longview, Wa. 98632
Alan Ellis 221-1280

Fourier Truck Service
P. O. 1
Molalla, Oregon 97038
Arnie Moselton 655-6163

Gresham Transfer, Inc.
12008 N.E. Inverness Dr.
Portland, Oregon 97220
Gerald Ulmer 255-7000

John Day-Portland Auto Freight
P. O. Box 577
John Day, Oregon 97845
Arnie Moselton 575-0560

Lower Columbia Trucking Co.
P. O. Box 612
Cathlamet, Wa. 98612
Kathleen Ritchie

McCracken Motor Freight
P. O. Box 10304
Portland, Oregon 97210
Curt McCracken 222-4295

McCracken Motor Freight
P. O. Box 2786
Eugene, Oregon 97402
Roman Eder 226-7303

Newberg Auto Freight
408 West First Street
Newberg, Oregon 97132
Gary Windsor 628-1111

Paradise Transfer, Inc.
P. O. Box 578
Medford, Oregon 97501
Sid Sanders 773-7761

Porter Truck Line
1818 S.E. 2nd. Ave.
Portland, Oregon 97214
Don Porter 222-9090

Risberg's Truck Line
2339 S.E. Grand Ave.
Portland, Oregon 97214
Jerry Risberg 232-7165

Sandy Truck Line, Inc.
P. O. Box 207
Sandy, Oregon 97055
James Patrick 668-4148

Stewart-Stiles Truck Line
Route 2 Box 415A
Forest Grove, Oregon 97116
Charles Davis 227-5240

Girard-Sherwood Truck Service
3641 N.W. Front Ave.
Portland, Oregon 97210
Roger Price 241-3310

Tillamook-Ptld Auto Freight
2703 E. Third Street
Tillamook, Oregon 97141
Buck Collelmon 842-2574

Tualatin Valley Transport
160 W. Main Street
Hillsboro, Oregon 97123
Jim Sanders 233-6427

Woodburn Truck Line, Inc.
1355 N. Front Street
Woodburn, Oregon 97071
Bruce Gunderson 224-0538

Woodland Truck Line
P. O. Box 70
Woodland, Washington 98674
Jim Johnson 222-6682

III. BEER AND WINE EMPLOYERS COUNCIL OF OREGON

Mr. John Fletcher, Chairman
Beer & Wine Employers Council
of Oregon
General Distributors, Inc.
P. O. Box 14397
Portland, OR 97214

Mr. Tom Haley
GAM & Company
2443 SE 4th Avenue
Portland, OR 97214

Mr. Ken Nehl
Emerald Distributing
P. O. Box 2491
Eugene, OR 97402

Mr. Jay Bryant
Hood River Distributors
1150 21st Street
Hood River, OR 97031

Mr. Lon Thomas
Thomas Distributing Co.
1768 13th Street SE
Salem, OR 97302

Mr. Glenn Thomas
A. J. Thomas & Son Distributing
840 South Front Street
Coos Bay, OR 97420

Mr. Ralph Thrift
Ralph Thrift, Inc.
P. O. Box 508
North Bend, OR 97459

Mr. George Nichols
Manchester's Distributing, Inc.
520 NE Kelly Avenue
Gresham, OR 97030

Mr. Zane Kemler
Western Beverage Co.
P. O. Box 2340
Eugene, OR 97402

Mr. Dan O'Neill
Carter Distributing Co.
P. O. Box 801
Albany, OR 97321

Mr. Neil Benaroya
Portland Distributing Co.
2026 NE Columbia Blvd.
Portland, OR 97211

Mr. Bob Clark
Dumont Distributing
P. O. Box D
Corvallis, OR 97330

Mr. Howard Hogan
Hogan Distributing
140 N Hill Street
Albany, OR 97321

Mr. Albert Stein
Stein's Distributing
12301 SE Highway 212
Clackamas, OR 97015

Mr. Stan Stein
Stein's Valley Beverage Co.
214 SE Walnut Street
Hillsboro, OR 97123

Mr. Bob Otto
St. Helens Ice & Beverage, Inc.
P. O. Box 981
St. Helens, OR 97051

Mr. Jim Pilgreen
Twin Cities Distributing
750 McKinley Street
Eugene, OR 97402

Mr. Larry Giusti
Giusti Wine Company
66 SE Morrison
Portland, OR 97214

Mr. Jack Nelsen, President
United Beer Distributors
15 NE Hancock
Portland, OR 97212

Mr. Chuck Morgan
Morgan Distributing Co.
13990 SW Fir Street
Oregon City, OR 97045

Mr. Donald Moar
River City Beverage Distributor
P. O. Box 809
St. Helens, OR 97051

IV. OTHER COMPANIES

Haley's Foods
PO Box 39
Hillsboro, OR 97123

Lewis Bros., Inc.
1005 SE Washington Street
Portland, OR 97214

Lynden Farms
Belozer's Hatchery &
Poultry Farm
2500 S. Beavercreek Rd.
Oregon City, OR 97045

Superior Fast Freight
400 SW 34th Street
Renton, WA 98055

Senator NICKLES. I believe under current statutes, we do have the possibility of being able to come back against trustees for acting in an imprudent manner, but that is seldom done, and particularly when you are talking about the amounts you are talking about it would be very difficult to collect anyway.

But I certainly think you have suggestions that are worthy of some merit in this idea of us looking at the responsibility of trustees of plans. Certainly that is broader than just multiemployer plans. You also have a different situation under single employer plans.

Mr. Cohn, in your situation, what is your status now. You said you sold your business and you received this withdrawal liability which was about equal to what you had in the business, is that correct?

Mr. Cohn, Yes, Senator, we sold our business, and the bill from the Western Conference has not been received as yet, but all indications are that it would be in the area of $150,000 which does represent my equity in the company. The entire value of my intrest may be taken from me by the 1980 law.

Senator NICKLES. What do you plan on doing?

Mr. COHN. I am looking at other business ventures now to go into, and as I said, I definitely will not go into any business venture which involved a multiemployer plan.

Senator NICKLES. Are you going to go to court to defy that assessment?

Mr. COHN. I am sorry, Senator?

Senator NICKLES. Will you go to court to appeal that assessment?

Mr. COHN. Yes, we will.

Senator NICKLES. Mr. Godsey, you mentioned that your employees voted the union out.

Mr. GODSEY. That is correct.

Senator NICKLES. And you received a withdrawal liability of what $750,000?

Mr. GODSEY. We have been informally advised that it is about that amount. We have not received the actual demand. We expect it within 60 days.

Senator **Nickles**. Do you think they are targeting unions and saying, "Well, wait a minute. Your people decertified so we are going to penalize them in a way to send a message that if you decertify, that it is going to be very expensive"?

Mr. **Godsey**. I think that is quite clear in the provisions of the plan in that if an employer were simply to go bankrupt or to simply close its doors under the provisions of the plan, the benefits that were vested by the employees would still be provided by the plan.

But in the event that the employees decertified the union, substantial benefits which have already been vested in the employees and they received statements from the plan would suddenly become forfeitable, and they were advised by the plan that that, in fact, was going to happen.

Senator **Nickles**. Prior to the election?

Mr. **Godsey**. Yes, prior to the election.

Senator **Nickles**. In spite of that, they still voted to decertify?

Mr. **Godsey**. That is correct.

Senator **Nickles**. You mentioned that you replaced the plan, or you have a company plan that is a better plan. What did you do with those employees that were vested? Did you take care of them? Are they going to receive less benefit now? Did they lose whatever is gone?

Mr. **Godsey**. Our company plan is a defined contribution plan which has, as a basis, an equal hourly contribution rate to the lumber industry plan, but we provide it for all hours worked. So that if an employee works a lot of overtime he gets additional contributions.

We took for all those employees and gave them credit in the calculation of their contributions back to their original date of hire which, in some cases, was 10 to 12 years prior to the time we purchased the facility in 1971 that their contributions were substantially increased.

Senator **Nickles**. You are giving your employees credit for the years of service they had. What union was this? The lumber——

Mr. **Godsey**. The Lumber and Sawmill Workers Union.

Senator **Nickles**. You gave them credit for *x* number of years that they were under the plan although you did not receive any money from that plan——

Mr. **Godsey**. That is correct. We did not receive any money from the plan.

Senator **Nickles**. Basically you are saying we are going to come up with a hunk of money and come up with a vested benefit for your employees so they do not lose out.

Mr. **Godsey**. Yes, what we are trying to do is to minimize the penalties that the employees were going to suffer from their action in withdrawing from the union.

Senator **Nickles**. Did they have any penalties? Is your contribution amount equal to or less than or greater than the contribution amount that was paid in, say, under the plan?

Mr. **Godsey**. Our contribution amounts we have paid in have been higher than we previously were required to pay in the past to the lumber industry pension fund.

For the older employees, of course, the ones who were not far from retirement, though, they had substantial vested benefits which, in the short period of time they may continue to work before retirement, we will not be able to replace that full amount they lost.

Senator NICKLES. Will they receive those benefits?

Mr. GODSEY. Not from the lumber industry pension fund apparently. There is going to be a substantial reduction.

Senator NICKLES. Do you view that as them saying you voted the union out so we are going to penalize you for that?

Mr. GODSEY. That is correct, and then in addition, the plan and the calculation or penalty, the $750,000 will not take that reduction into account. It will not be credited in the calculation of the withdrawal liability nor will the withdrawal liability itself be credited to the withdrawing employee's account or to the account of the other employees that we have that are still covered by the plan.

Senator NICKLES. Do you think that $750,000 was actuarily correct?

Mr. GODSEY. No, sir.

Senator NICKLES. Gentlemen, thank you very much for appearing before our subcommittee today and also for your suggestions.

We very much appreciate them.

Our next panel consists of Malcolm Pritzker with Graphic Arts International Union Supplemental Retirement and Disability Fund; Laurence Pierce, Transportation Association of America; and Larry Miller, Truck Renting & Leasing Association from Des Moines, Iowa.

Gentlemen, if you would summarize your statements, I certainly would appreciate it.

STATEMENT OF MALCOLM L. PRITZKER, TRUSTEE, WASHINGTON, D.C., GRAPHIC ARTS INTERNATIONAL UNION SUPPLEMENTAL RETIREMENT AND DISABILITY FUND AND LAURENCE A. PIERCE, FIRST VICE PRESIDENT, THE FIRST NATIONAL BANK OF BOSTON, BOSTON, MASS., AND LARRY MILLER, PRESIDENT OF TRUCK RENTING & LEASING ASSOCIATION, EXECUTIVE VICE PRESIDENT AND CHIEF OPERATING OFFICER, RUAN COMPANIES, DES MOINES, IOWA

Mr. PRITZKER. Yes, sir. I was going to be joined by a representative of the national employers association, the graphic arts employers. However, Mr. Solomon of that organization will not be testifying for the purpose of cutting down the length of the testimony. His written testimony was submitted to the committee.

Just very briefly, sir, we have 51,000 participants in our fund. We have 1,500 employers. They employ an average of 36 employees. We have $200 million in assets, and our 30 trustees, both union and management, contrary to some other descriptions, are not of retirement age or near retirement nor have they been imprudent as witness the fact that the assets of our fund exceed and have always exceeded the vested liabilities of the fund.

Therefore, we are not liable for employer withdrawal liability. Despite that fact, the employers in the fund or the employers who might be interested in joining the fund as a result of multiemployer bargaining or individual employer bargaining are scared of the possibility of employer withdrawal liability, of course, on the basis of the kind of testimony we have heard here today and the articles which have appeared in the media.

We, therefore, have several recommendations, and I will just go right to those recommendations.

No. 1, and these are the same recommendations we made in 1979 in similar testimony, that employers withdrawing from a multiemployer fund in which the assets exceed the vested liability, such as ours, should have no employer withdrawal liability.

No. 2, that, as an alternative, a withdrawing employer from any kind of plan should have no liability unless the fund is in reorganization or goes to reorganization within 5 years following the period of the withdrawal.

Now, despite the fact that our fund has no employer withdrawal liability because of the prudent job that our trustees have done we can understand that, as a price of citizenship perhaps, we should pay some premiums into a fund at the PBGC for which we will never get any return.

We would suggest, however, that legislation be passed to make those premiums risk related. Using the same nautical analogy that has been used by other witnesses, if we have built a very seaworthy boat, we do not see that we should be paying the same kind of insurance as other funds who have built their boat and then taken various planks and then thrown them overboard.

We suggest that the imprudence of trustees of some plans that have been testified to here would be remedied if, in fact, risk related premiums were adopted.

For example, if funds as well managed as ours could pay half the premiums and a fund that is very poorly managed would pay substantially more than the premiums that are now provided by PBGC statutes, the trustees on a basis of basically a carrot and a stick approach could well be convinced of the benefit of adopting the prudent measures that really should be adopted by all trustees. Thank you, sir.

[The prepared statement of Mr. Pritzker follows:]

STATEMENT OF MALCOLM L. PRITZKER ON BEHALF OF THE GRAPHIC ARTS INTERNATIONAL UNION SUPPLEMENTAL RETIREMENT AND DISABILITY FUND

My name is Malcolm L. Pritzker, and I am a Trustee of the Graphic Arts International Union Supplemental Retirement and Disability Fund.

The GAIU Supplemental Retirement and Disability Plan is a jointly trusteed multiemployer pension plan which provides benefits for approximately 51,000 participants in the Graphic Arts Industry in the United States and Canada. Approximately 41,000 of the participants are employed in the United States. One thousand one hundred and thirty-two employers in the United States contribute to the Plan to provide benefits for their employees. An additional three hundred and thirty-three Canadian employers contribute to the Plan.

Dividing the number of United States covered participants by the number of United States contributing employers shows that the average contributing employer employs thirty-six participants.

The only vehicle through which meaningful benefits can be provided to employees of the relatively small companies in the Graphic Arts Industry is by the formation of multiemployer plans. This is evidenced by the fact that the number of covered participants grew from 30,000 in 1970 to 51,000 in 1981. The number of retirees receiving benefits from the Fund has grown from 400 in 1970 to 7,720 in 1981. The assets of the Fund have increased from ten million in 1970 to two hundred millions in 1981. Our actuaries have projected that the assets of the Fund will be approximately five hundred million dollars by 1990.

The Plan, since its inception in 1966, has provided three different kinds of benefits:

A. Basic Retirement Benefit. This benefit is based on the earnings of the employees on which employer contributions are made. The benefit is payable at a normal retirement age of 65 or as early as age 60 upon retirement from the industry;

B. Supplemental Early Retirement Benefit. This benefit is designed to permit a participant between age 60 and 65 to retire and receive from this Fund a substantial portion of the amount he will receive from Social Security at the age at which he is eligible to receive a Social Retirement benefit;

C. Long Term Disability Benefit. A monthly pension benefit payable to age 65 for a participant who is unable to work in the industry because of disability. At age 65 the participant receives his basic retirement benefit.

The Plan is financed by employer contributions which are a percentage of covered wages. The details of the amount and method of contributions are negotiated between the over 1,500 employers and representatives of over 100 local unions.